No. 99-296

Supreme Court, U.S.
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In The

Supreme Court of the United States

DEBRA WALKER, JEANETTE WASHINGTON, HAZEL WILLIAMS, ZELMA LANG, RENITA BROWN, LILLIE THOMPSON, TRACEY SMITH,

Petitioners,

v.

CITY OF MESQUITE, TX; DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; THE HOUSING AUTHORITY OF THE CITY OF DALLAS; HIGHLANDS OF McKAMY IV AND V COMMUNITY DEVELOPMENT ASSOCIATION; GINGER LEE; PRESTON HIGHLANDS HOMEOWNERS' ASSOCIATION, INC.; DAVID BEER; HIGHLANDS OF McKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION; and THE CITY OF DALLAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. WHETHER PETITIONERS PRESENTED SUFFICIENT EVIDENCE TO SATISFY THE CONSTITUTIONAL REQUIREMENTS OF NARROW-TAILORING THAT RACE-BASED NEW CONSTRUCTION IN PREDOMINANTLY WHITE AREAS OF THE CITY WAS NECESSARY TO DESEGREGATE PUBLIC HOUSING IN DALLAS WHEN SECTION 8 RENT SUBSIDIES, A SPEEDIER, LESS INTRUSIVE AND RACE-NEUTRAL REMEDY WAS AVAILABLE AND HAD BEEN SUCCESSFUL IN MOVING BLACK FAMILIES INTO WHITE AREAS OF THE CITY.

PARTIES TO THE PROCEEDING

The following listed persons are parties to this proceeding:

Name	
Debra Walker	Petitioner
Jeanette Washington	Petitioner
Hazel Williams	Petitioner
Zelma Lang	Petitioner
Renita Brown	Petitioner
Lillie Thompson	Petitoner
Tracey Smith	Petitioner
City of Mesquite, Texas	Respondent
Department of Housing & Urban Development	Respondent
The Housing Authority of The City of Dallas	Respondent
Highlands of McKamy IV and V Community Development Association	Respondent
Ginger Lee	Respondent
Preston Highlands Homeowners' Association, Inc.	Respondent
David Beer	Respondent
Highlands of McKamy IV And V Community Improvement Association	Respondent
The City of Dallas	Respondent

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents respectfully submit the following brief in opposition to the Petition For A Writ Of Certiorari:

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-35) is reported at 169 F.2d 973, The opinions of the district court (App. 36-65, 66-206) are unreported.

JURISDICTION

Respondents agree with the statement of jurisdiction in the Petition for Writ of Certiorari.

CONSTITUTION, STATUTES, RULES AND REGULATIONS

The following constitutional, statutory, and regulatory provisions are involved in this case: U.S. Const. Amend. XIV (Equal Protection Clause); 42 U.S.C. § 1983 (1994); The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601, 4626 (1995); 24 C.F.R. § 880.103(a) (1996); and 24 C.F.R. § 941.202(c) (1996) and Rule 10, Supreme Court Rules.

STATEMENT OF THE CASE

Introduction

As detailed below, the Fifth Circuit's decision in this case does not merit review by this Court because it correctly applied strict scrutiny to the district court's race-conscious remedial order requiring the construction of 474 units of public housing in "predominantly white areas" of Dallas. However, before addressing the reasons why the Petition should be denied, Respondents wish to correct one of the assertions in the Petition.

Petitioners state that Respondent Homeowners "sought to keep public housing and *public-housing residents* out of white areas." Pet. at 3. (emphasis added) This is not true. As Petitioners are forced to acknowledge on page 4 of their Petition, Respondents have never sought to keep public-housing residents out of white areas. Respondents have only sought to have the district court use a race-neutral remedy, Section 8 vouchers, before resorting to construction of new public housing in "predominantly white areas" of the city. Homeowners objection to the construction of new public housing in this case is based on (1) the intrusiveness of new construction, (2) the propensity of government owned housing to become slums and (3) the race-based method by which the sites in this case were selected. Homeowners do *not* object to the public-housing residents themselves whether they are white or black. Indeed, Ginger Lee, one of the Homeowners who filed this case, is black.

Facts

Respondents adopt the statement of facts contained in the "Background" section of the Fifth Circuit's opinion, App. 3-10, with one exception. The Court of Appeals states that in "September, 1994, the district court held a trial on the issue of a remedy". App. 7. It then states that "The district court entered its remedial order affecting DHA in February 1995 and its remedial order affecting HUD in April, 1996." App. 7. The conjunction of these sentences gives the misleading impression that the district court's remedial orders in this case, *see* Supp. App. 39 and 60, were the result of contested hearings. In fact, however, the order affecting DHA was purely the result of negotiations between two of the parties to this case, DHA and Petitioners. Supp. App. 6, 7, 13.[1]

It must be remembered that DHA and Petitioners have been litigating this case since it was filed in 1985, App. 3, long before Respondent Homeowners filed their own action in 1996 which was thereafter consolidated with Petitioners' case. During the negotiations leading up to the entry of the district court's order, DHA never made a proposal that did not include some construction of new public housing. Supp. App. 19. Accordingly, the possibility that desegregation could be accomplished without new construction was never considered before Homeowners filed their case. Even the definition of a "predominantly white area", defined as having a minority population of less than 37% but meaning more than 63% white, and the total number of public-housing units to be

[1] Respondents have included a Supplemental Appendix (hereinafter "Supp. App. ___") at the end of this brief which supplies new material not contained in Petitioners' Appendix.

created by the district court's order, were the result of proposals made by Petitioners to DHA. Supp. App. at 15, 16. The district court simply adopted this negotiated order without any consideration of alternatives or of the impact it would have on third parties.

Only in 1996 after the public-housing sites had been selected and Respondent Homeowners had filed their suit, did the district court even consider that its race-conscious order was subject to strict scrutiny. However, after giving Respondents an evidentiary hearing, the district court simply rubber-stamped its original decree derived from the negotiated settlement. It then abrogated the task of making any independent findings by adopting *in toto* the Findings of Fact and Conclusions of Law submitted to it by Petitioners' counsel. App. 24.

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly reversed the race-conscious portion of the district court's remedial order which required construction of 474 units of new public housing in "predominantly white areas" of Dallas. It left intact 5,628 units of Section 8 housing. The Fifth Circuit held, after application of the five part test in *United States v. Paradise*, 480 U.S. 149 (1987), that the district court's order was not "narrowly-tailored" because Petitioners had not presented sufficient evidence that race-conscious new construction was necessary when a race-neutral alternative, Section 8 rent subsidies, was available.

Petitioners' argument that review is warranted by this Court because HUD's site-selection regulation is

somehow threatened by the Fifth Circuit's decision is contrary to Petitioners' own assertion below and would require this Court to review a hypothetical case because the Fifth Circuit never addressed the constitutionality of HUD's regulation. There is likewise no conflict between the Fifth Circuit's decision and any decision of this Court or of any sister Court of Appeals. The decisions on which Petitioners rely never applied strict scrutiny to a choice between race-based new construction and race-neutral Section 8 rent subsidies and therefore do not concern "the same important matter" within the meaning of Rule 10 of this Court. There is likewise no conflict between the Fifth Circuit's decision and this Court's decision in *United States v. Paradise*, 480 U.S. 149 (1987) on whether new construction best fits the violation in this case because Petitioners never presented sufficient evidence that it did.

Finally, Petitioners failed to show that the Fifth Circuit did not give proper deference to the exercise of the district court's discretion to fashion a remedy because such discretion had to be exercised "within appropriate constitutional and statutory limits" and was not. The district court applied the wrong legal standards for narrow-tailoring in a number of respects and squandered its discretion by adopting *in toto* Petitioners' Proposed Findings of Fact and Conclusions of Law. App. 24.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. NEITHER NATIONAL PUBLIC POLICY NOR HUD'S SITE-SELECTION REGULATION IS THREATENED BY THE FIFTH CIRCUIT'S DECISION IN THIS CASE AND NEITHER MATTER IS SQUARELY PRESENT FOR REVIEW BY THE DECISION BELOW.

In an effort to make its Petition more appealing to this Court, Petitioners argue that 24 C.F.R. § 941.202(c) (1996)[2], a regulation dealing with site selection for new construction projects funded by HUD, is somehow threatened by the Fifth Circuit's decision in this case. However, this argument is directly contrary to Petitioners own assertion in a memorandum filed in the district court after the Fifth Circuit's decision was rendered. Supp. App. 27 ("the HUD site-selection criteria were not challenged by the Homeowners and were not overturned by the Fifth Circuit.") Furthermore, there is simply no basis for this argument.

The Fifth Circuit's opinion never addressed the constitutionality of HUD's regulation. All the Fifth Circuit held in this case was that it would be premature to order new construction of public housing in predominantly white areas of Dallas as part of a judicially-mandated

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[2] 24 C.F.R. § 941.202(c) (1996) provides as follows: "The site for new construction projects must not be located in: (1) an area of minority concentration unless (i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area."

desegregation order when Section 8 vouchers offer a promising race-neutral alternative to desegregate public housing. App. 24-25, 35.

HUD is before the district court in this case not as a governmental agency engaged in an impartial funding decision, but as a defendant that has been ordered by the district court to fund the projects in question in order to make restitution for its own acts of past discrimination. Supp. App. 39; App. 3. By contrast, the constitutionality of the HUD regulation presents the issue of what conditions government may constitutionally impose on the public financing of housing projects that are not the subject of court-ordered desegregation, an issue not presented by this case. There is nothing in the Fifth Circuit's decision which prohibits race-based site selection that results from voluntary agreements entered into between HUD and local housing agencies outside of the context of court-ordered desegregation. To use this case as a vehicle for deciding that issue is therefore to present what is only a hypothetical issue for review by this court.

The language of the Petition itself implicitly acknowledges that the issue raised is not squarely presented by the decision below. The Petition argues that national public policy and the HUD regulation supports and requires the use of a "*similar* race conscious public-housing site-selection procedure". Pet. at 9. (emphasis added). Likewise, Petitioners argue that "[T]he district court remedial order declared unconstitutional by the Fifth Circuit is *similar* to the regulation". Pet. at 10 (emphasis added). Petitioners further argue that the application of narrow tailoring to the remedial order "has the *potential* to affect

the application of the HUD regulation and national policy throughout the country." Pet. at 11-12 (emphasis added).

The use of such ambiguous terms clearly reveals that no national public policy or any HUD regulation is directly implicated by anything decided by the Fifth Circuit. This Court should not accept review of an issue that exists, if at all, only by way of analogy. The constitutionality of the HUD regulation should await decision in a case where it is squarely presented so that this Court will not be taken far afield into undecided matters. An illustration will help make this clear.

If Petitioners were to secure review of this case on the grounds that the Fifth Circuit's decision "potentially" threatens national policy as reflected in HUD's site-selection regulation, then the Court would also have to address the potential impact of other housing regulations and statutes such as 42 U.S.C. § 4626 (1995) and 24 C.F.R. § 880.103(a) (1996) which are applicable in the circumstances of this case, but were not considered below.

In 42 U.S.C. § 4626 (Section of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 entitled, "Housing replacement by Federal Agency as a last resort"), Congress indicated a clear preference for the use and acquisition of existing housing structures such as apartments over new construction in relocating public-housing tenants. A HUD regulation likewise specifies that, with certain exceptions, new housing may only be erected as a last resort. 24 C.F.R. § 880.103(a) (1996). *See also Society Hill Civic Assn. v. Harris*, 632 F.2d 1045, 1056 (3rd Cir. 1980).

The circumstances of this case are directly relevant to the Relocation Act because the district court's order contemplates 2,807 replacement units, App. 31, and the relocation of thousands of public-housing tenants from the demolished units in West Dallas. *See* App. 5, n.5; *Walker v. HUD*, 912 F.2d 819 (5th Cir. 1990). The Relocation Act reflects a congressional preference to use new construction for relocation purposes as "a last resort" and an intent by Congress that relocation of persons "shall be carried out in a manner that entails the minimum disruption of neighborhoods." *Society Hill v. Harris*, 632 F.2d 1045, 1054 (3rd Cir. 1980). The Fifth Circuit's decision in this case declaring new construction of public housing in white areas of the city to be "a last resort measure", App. 34, is supported by the Relocation Act which, as a congressional statute, supersedes any HUD regulation.

Of course, the Relocation Act is not controlling in this case any more than HUD's regulation. The controlling issue here is the constitutionality of alternative remedies in court-ordered remediation of past discrimination. Such decrees are based on constitutional grounds and, as such, are not trammeled by statutes or regulations, even if they may be informed or guided by them.

But there is no need to decide any of these issues. Petitioners have not been denied a remedy because of any misapplication of the HUD regulation. Indeed, Petitioners have not been denied a remedy at all; they have in fact received a full and comprehensive one. *See* Remedial Order Affecting DHA Supp. App. 60. They have only been denied one particular kind of remedy, 474 units of new construction out of a total of 6,012 housing units, App. 31, and only because the evidence offered to justify

it was insufficient. The Fifth Circuit merely held that Petitioners had failed to sustain their burden of producing sufficient evidence to show that race-based new construction instead of race-neutral Section 8 housing meets the constitutional requirements of a narrowly-tailored remedy in the circumstances of this case.[3] *See* App. 19-20, 28-35. Such a fact-specific, evidentiary holding does not require intervention by this Court.

II. NO REAL OR INTOLERABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE FIFTH CIRCUIT IN THIS CASE AND THE DECISIONS OF OTHER CIRCUITS ON THE SAME MATTER.

Petitioners argue that the decision by the Fifth Circuit in this case is in conflict with decisions of the Second, Third and Seventh Circuits because these circuits have applied "the use of racial classifications to individual site decisions without requiring exhaustion of race-neutral efforts," *citing United States v. Yonkers Bd. Of Education*, 837 F.2d 1181, 1236-37 (2d Cir. 1987); *Gautreaux v. Pierce*, 690 F.2d 616, 622-623 (7th Cir. 1982); *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982); *Otero v. New York Housing Authority*, 484 F.2d 1122, 1134 (2nd Cir. 1973); and *Shannon v. HUD*, 436 F.2d 809, 821-22 (3rd Cir. 1970). Pet. at 12-13.

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[3] *Cf. City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 500 (1989), *quoting Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 277 (1986) (requiring the City of Richmond to show a "strong basis in evidence for its conclusion that remedial action was necessary."); *Wessmann v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) ("*Croson*, in particular, leaves no doubt that only solid evidence will justify allowing race-conscious action . . . ").

But in none of Petitioners' cases did the Court address or the parties argue that under principles of strict scrutiny of race-conscious judicial decrees, a race-neutral remedy – Section 8 vouchers that could be used in "any area" of the city – constituted a less intrusive but still adequate remedy that should be tried before using a race-conscious remedy – construction of new housing in predominantly white areas of the city.

The mere fact that some of Petitioners' cases involved decrees that included both Section 8 housing and new construction in no way establishes that such decisions are in conflict with the decision below. None of Petitioners, cases invoked strict scrutiny as a basis for engaging in a balancing of race-conscious and race-neutral alternatives as more recent cases do. *See In Re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1545-49 (11th Cir. 1994).

Rule 10(a) of this Court's rules indicates that this Court will consider as a possible ground for granting a writ of Certiorari a decision in conflict with the decision of another United States Court of Appeals "on the same important matter." The cases Petitioners cite do not even discuss the matter of whether race-neutral Section 8 vouchers can be utilized as a means to remedy past discrimination in public housing before ordering new construction. The absence of any discussion of such an issue in Petitioners' cases may be due to the fact that, except for *Yonkers*, all of Petitioners' cases, pre-date this Court's decision in *United States v. Paradise*, 480 U.S. 149

(1987) which applied strict scrutiny analysis for the first time to judicial decrees.[4]

Moreover, *Yonkers* is easily distinguishable on its facts because *Yonkers* utilized a geographical rather than a race-conscious decree and involved no discussion of Section 8 vouchers as an alternative remedy to new construction.[5] Accordingly, the absence of any real or intolerable conflict on "the same important matter" and the ancient vintage of Petitioners' cases which predate intervening Supreme Court authority on the strict scrutiny requirement make any alleged conflict an insufficient ground for granting a Writ in this case. Rule 10; Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, p. 172 (7th Ed. 1993) ("A conflict with a decision which has been discredited or has lost all weight of authority by reason of intervening decisions of the Supreme Court . . . will not be an adequate basis for granting certiorari.").[6]

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[4] Three of Petitioners' cases, *Alschuler*, *Otero*, and *Shannon* are also distinguishable because they do not even involve remedial desegregation orders based on past racial discrimination, but only whether there was compliance with federal housing regulations.

[5] In *Yonkers*, the Court ordered the city to construct 200 units of family housing "outside of Southwest Yonkers." 837 F.2d at 1236-37. The only restriction on location of the new sites was thus purely geographic. There *was no racial component to the order*. There is likewise no indication in the opinion that the city ever suggested the use of Section 8 housing as an alternative to new construction.

[6] Furthermore, the factual circumstances of this case are very different from the factual circumstances in Petitioners' cases due to the extensive relocation of tenants required by the demolition of projects in West Dallas and the limitations on

III. THE FIFTH CIRCUIT'S DECISION DOES NOT PROHIBIT RACE-CONSCIOUS SITE SELECTION AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioners argue that "the Fifth Circuit's decision prohibiting the use of race-conscious site selection conflicts with the decisions of this Court that require all remedies, race-conscious or race-neutral, fit the violation." Pet. at 13-14. However, Petitioners misread the Fifth Circuit's opinion.

The Fifth Circuit adopted no broad-based prohibition on race-conscious site selection. All the Court held was that "[b]ecause there are promising non-racially discriminatory ways to continue desegregating housing in Dallas . . . it is *premature* to utilize such a last resort measure [as race-conscious site selection]." (Emphasis added). App. 34. The Fifth Circuit also stated: "the District Court erred in employing a race-conscious remedy *before* utilizing race-neutral alternatives." (Emphasis added). App. 34-35. Clearly if the Fifth Circuit had intended any kind of blanket prohibition of race-conscious site selection, it would not have used terms like "premature" and "before" in describing the problem with a race-conscious remedy. If the race-neutral alternatives are not successful, the Fifth Circuit has not ruled out using race-conscious site selection at a later date.

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replacement housing imposed by the Relocation Act. Such important differences arising from differences in states of fact and not in the application of any principle of law is not a proper ground for granting a Writ of Certiorari. *See The Wisconsin Electric Co. v. The Dumore Co.*, 282 U.S. 813 (1931).

Petitioners nonetheless try to demonstrate a conflict with this Court's decision in *United States v. Paradise*, 480 U.S. 149 (1987) on the alleged ground that the remedy in this case will not "fit" the violation. This argument, when closely examined, reveals no conflict with any legal principle in *Paradise* or any other decision of this Court.[7] Rather Petitioners' argument amounts to a disagreement over the application of well-established principles to the specific facts of this case. Ordinarily, that is not a proper ground for review by this Court.

Even on its own terms, however, the argument is unfounded. Petitioners argue that "race-neutral site-selection criteria will leave predominantly black and other minority-concentrated areas eligible for development of the already allocated public-housing units." Pet. at 14. But this argument is largely irrelevant because the *eligibility* for construction of new public housing in minority areas does not mean that such units will or are even likely to be built there. In *Yonkers*, the Court ordered construction "outside of Southwest Yonkers", a race-neutral criteria that made it theoretically possible that some construction could occur in minority areas. That possibility did not render the order constitutionally suspect.[8]

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[7] Petitioners cite, but do not claim any conflict with *Hills v. Gautreaux*, 425 U.S. 284 (1976). Pet. at 10. That decision was distinguished by the Fifth Circuit. App. 21, n.20.

[8] Petitioners' suggestion that "existing neighborhood and political opposition will continue to pressure DHA's decision on sites away from white areas and into minority areas", Pet. at 14, adds nothing to this argument. As the Fifth Circuit found, Plaintiffs, DHA and HUD, are now all "cooperating defendants." App. 28. There is no evidence in this record that

Furthermore, the persuasiveness of Petitioners' argument is not enhanced by their suggestion that under certain circumstances construction might occur in census tracts with a "non-Hispanic white population between 50% and 63%." Pet. at 14. In the real world such an area would be considered predominantly white and therefore suitable for integrated housing. However, under the district court's order predominantly white is defined as "less than 37% Hispanic, black or other minority," App. 8, or the equivalent of 63% white. Thus, while Petitioners are correct in suggesting that under the Fifth Circuit's order public housing could theoretically be built in areas with a 50% to 63% white population, it is hard to discern how that would harm the effort to desegregate public housing in Dallas or cause the remedy not to "fit" the violation. Furthermore, the Fifth Circuit found that "[T]here is no evidence in the record to support the Court's arbitrary definition of a predominantly white neighborhood" as 63% white. App. 32.

Petitioners' argument that the remedy doesn't fit the violation is also misguided because it focuses entirely on the 474 units of new construction in the district court's order as if that were the only legitimate method for desegregating public housing in Dallas. However, other alternatives including Section 8 housing offer superior means for accomplishing that end.

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absent an order requiring DHA to locate public housing only in white areas, that DHA will in fact place any appreciable number of units of new construction in minority areas. In fact, given the present DHA administration, the likelihood is just the opposite – most if not all units will be placed in white areas whenever HUD and DHA find the opportunity to do so.

This case is about people, not about any particular form of housing. There is no constitutional right "to dwellings of a particular quality," *Lindsay v. Normet*, 405 U.S. 56, 74 (1972), nor do municipalities have any constitutional duty to provide low-income housing. *Acevedo v. Nausau County, New York*, 500 F.2d 1078, 1080-81 (2d Cir. 1978). New construction is therefore not an entitlement that is owed to the victims of past housing discrimination. What they are entitled to receive is *integrated housing* whatever form it may take.

It is undisputed from this record that blacks can be moved into white areas of Dallas more rapidly, less expensively and with far less intrusiveness to adjacent property owners through Section 8 rent subsidies than through new construction. Between 1994 and 1996, the number of black families that had been moved into predominantly white areas of the city under the Section 8 program increased by 27%, App. 25, and the Fifth Circuit found that the record indicates that [the program] could be more successful with, for example, "increased funding for both more vouchers and the mobility program, more mobility counselors and higher fair market exception rents." App. 26-27.

Even more tellingly, the Fifth Circuit observed that the district court's own order relied overwhelmingly on Section 8 vouchers to achieve desegregation because 5,628 units or 92% of the units to be created under that order would be Section 8 units. As the Court of Appeals stated:

> If Section 8 can effectively satisfy the district court's remedial goal regarding 5,628 units, it is

> baffling to assume that it cannot do so for an additional 474 units.

App. 31. Because Petitioners never presented evidence sufficient to answer this question, the Fifth Circuit reversed that portion of the district court's order which required DHA to build 474 units of new construction in white areas of the city. App. 25. Petitioners have pointed to no evidence that would show that the Fifth Circuit abused its discretion in reaching this conclusion.[9]

Although Petitioners fail in their effort to show that the Section 8 remedy does not fit the violation, Petitioners fall back on the argument that a race-conscious, "predominantly white" remedial site-selection criteria "best" fits the violation in this case because "it is framed to address the exact effect and harm resulting from the predominantly minority site-selection criteria of the past." Pet. at 16. This argument is based on the concept of retributive justice, namely an eye for an eye; if the original wrong involved new construction, then new construction must be part of the remedy. However, this argument misperceives the nature of the wrong in this case.

The constitutional harm suffered by black tenants of public housing in Dallas has been to segregate them from whites, thereby denying them "the important benefits of

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[9] Petitioners also make the truly astounding argument that "Section 8 vouchers do not fit the public-housing violation." Pet. at 15. However, this argument, if true, would apply with equal force to 92% of the district court's own order, the terms of which Petitioners themselves negotiated. If Section 8 does not fit the violation, why have Petitioners accepted it for over 90% of the relief they sought in this case?

interracial association." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). While the benefits of interracial association were originally taken away by forcing blacks into public-housing projects in black areas of the city, *see Walker v. HUD*, 734 F.Supp. 1289, 1294-96 (N.D. Tex. 1989), forcing blacks today into housing projects in white areas of the city is not the only way or even the best way to remedy that wrong.

The history of housing projects in Dallas has been a dismal one. The West Dallas project referred to by various Courts as a "publicly-owned slum," *Walker v. HUD*, 734 F.Supp. at 1276, 1308, and as "one of Dallas' worst slums," *Walker v. HUD*, 912 F.2d at 821, consisted of 3500 Units, 1300 of which had been vacant and boarded up for at least ten years because they were not fit to be occupied by humans. *Walker v. HUD*, 734 F.Supp. at 1308. As a result, the district court required the demolition of approximately 2600 units of public housing in the West Dallas project. *See Walker v. HUD*, 912 F.2d at 819. *See also* App. 5. It was these units that were to be replaced on a one-for-one basis with additional public-housing units and with rental units subsidized by Section 8 certificates and vouchers. *See* App. 5.

Given these facts, there is no reason why the housing projects of the past need to be replaced with housing projects of the future and why the residents of Dallas, and these Homeowners in particular, must risk more housing projects turning into slums. Judges are not required to ignore the lessons of history. Because of the massive failure of public housing in the past, Congress in recent years has overwhelmingly favored rental subsidies over new construction in its appropriation of public-

housing funds.[10] That same preference is embodied in the Uniform Relocation and Real Property Acquisition Policies Act of 1990, 42 U.S.C. §§ 4601, 4626, et. seq. Moreover, it is undisputed that the majority of public-housing participants in this case prefer Section 8 housing over public-housing projects. App. 22. Even the district court itself in its decree overwhelmingly favored Section 8 housing to public-housing projects and agreed that Section 8 housing was more cost-efficient than new construction. App. 22. Unquestionably, Section 8 housing can accomplish racial integration more quickly than housing projects since the apartment units already exist and Section 8 rent subsidies are clearly less intrusive to adjacent property owners than the mortar and brick of new construction.

Public projects also have significant drawbacks that may be less pronounced in Section 8 housing. For example, housing projects where the residents are primarily of one race, often lead to resegregation within the projects themselves, *see Otero v. New York Housing Authority*, 484 F.2d 1122, 1132-36 (2d Cir. 1973), whereas Section 8 housing is more likely to contain fee-paying tenants of other races.

These and other reasons substantially undermine Petitioners' assertion that new construction "best" fits the

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[10] For example, as part of its 1997 budget, Congress appropriated over $9 billion ($9,000,000,000) for housing assistance programs, $8 billion ($8,000,000,000) of which is expressly allocated to "Section 8 subsidy contracts." 105 P.L. 65, 111 Stat. 1344 (1997). By contrast, Congress appropriated only $300 million dollars ($300,000,000) in the Hope VI statute under which DHA got its new construction funds in this case.

violations in this case. Because the benefits of interracial association can be fostered just as completely by Section 8 housing as by new construction, but without many of the disadvantages of new construction and without the use of explicit racial criteria, Petitioners' argument is not persuasive. Even if it were, however, the necessity for new construction was never established by sufficient evidence in the trial court. More importantly, none of these arguments demonstrate a conflict with any decision of this Court.

IV. THE FIFTH CIRCUIT DECISION CORRECTLY BALANCED THE RIGHTS OF THE COMPETING PARTIES IN ACCORDANCE WITH THE STANDARDS ESTABLISHED BY THIS COURT.

Petitioners argue that the Fifth Circuit's decision conflicts with this court's decision in *United States v. Paradise*, 480 U.S. 149 (1987) because it adopts a "new [and drastically lower] standard for impermissible impact on third parties . . . " Pet. at 18. There is simply no truth to this claim.

First, in articulating the standard for review in this case, the Fifth Circuit explicitly adopted the standard for reviewing race-conscious remedies set out in *United States v. Paradise*. App. 19. There is no statement anywhere in the Fifth Circuit's decision that it was following any different or lesser standard.

Second, there is no indication that the Court of Appeals gave any undue weight to that particular part of the *Paradise* standard that requires consideration of the impact of the remedy on the rights of innocent third

parties. If anything, the Court dealt with this factor rather perfunctorily. App. 33-34. A fair reading of the Fifth Circuit's decision quickly reveals that it was other factors in the *Paradise* test that played a far larger role in the balancing process undertaken by the Court of Appeals than did the impact on third parties. *Compare* App. 28-33 with 33-34.

Petitioners also incorrectly characterize the Fifth Circuit's decision as holding that the district court's "stringent measures" to prevent harm to adjacent homeowners "did not show narrow-tailoring". Pet. at 18. This is incorrect. The Fifth Circuit never concluded that the district court's efforts to prevent deterioration of the projects was not a factor in favor of narrow-tailoring. In fact, the Fifth Circuit was careful to note that "the district court showed considerable sensitivity to the fact that public housing has in the past been disgracefully neglected in Dallas." App. 33. However, the Court concluded that these safeguards cut two ways:

> On the one hand, it attempts to placate their fears of deterioration in their neighborhoods. On the other hand, it lends credibility to those fears.

App. 34.

In making this statement, the Court of Appeals was merely suggesting that the impact factor was fairly evenly balanced. However, it concluded that "because there are promising, non-racially discriminatory ways to continue desegregating public housing in Dallas, . . . under the balance of the *Paradise* factors, the criterion

[new construction] is not narrowly-tailored, and it is premature to utilize such a last resort measure." App. 34. The court thus gave no undue weight to the factor of third party impact, but rather assessed the need for new construction in relation to the availability of other remedies and found Petitioners' need for that remedy "premature" at this time. There was no error in the Fifth Circuit's methodology and no conflict with any decision of this Court.

Finally, the result reached by the Fifth Circuit, although different from the one reached in *Paradise*, is fully consistent with the rationale of that decision. In *Paradise*, this Court reviewed the constitutionality of a race-conscious order whereby the district court required that one black officer in the Alabama Department of Public Safety be promoted for every one white officer until the department had developed a promotion plan without adverse impact on black officers. In holding that such a one-to-one order was narrowly-tailored, this Court emphasized that the order was: (1) temporary in duration, (2) within the department's power to end, (3) limited in scope because it was only applicable in limited circumstances and (4) diffuse in impact because it only postponed promotions for whites rather than ending them. In light of the conclusion that the district court had no other effective remedy available to it, 480 U.S. at 177, this Court found that the promotion requirement "does not disproportionately harm the interests or unnecessarily trammel the rights of innocent individuals." 480 U.S. at 183.

The impact of the district court's order in this case is very different. First and perhaps most importantly, the

impact in this case is *not* temporary. As long as Homeowners live adjacent to public housing built pursuant to the district court's order, the value of their homes, the quality of their lives and their personal safety will be affected by any deterioration in or anti-social behavior from the public-housing projects.[11] One can debate endlessly the likelihood of these events occurring at the new sites or the sufficiency of the so-called "stringent" methods taken by the district court to prevent such deterioration (e.g., enforcement of city housing codes), but the extended duration of any impact on the Homeowners if the housing deteriorates is not debatable. It will last as long as they live in the neighborhood. As previously noted, large portions of the West Dallas projects were uninhabitable for ten years.

Second, Homeowners have little, if any, control over the impact that the public housing will have on their neighborhoods. If the public housing deteriorates, they can do no more than complain to the City of Dallas or hire attorneys to bring such issues to the attention of the district court. Therefore, unlike the defendants in *Paradise* who had the ability to end the race-conscious order by devising a constitutional promotion procedure, Homeowners have no such control. They are totally at the mercy of others.

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[11] *See Walker v. HUD*, 734 F.Supp. 1272, 1276 (N.D. Tex. 1989) (describing "the appalling conditions at West Dallas – housing that was barely fit to live in, almost 1300 units that were boarded up; severe problems with drug dealers, with other crimes, with transients, and with vandalism; health risks due to lead contamination; a bitter life with roaches and rats and rubbish."

Third, the impact of the district court's order is not limited in scope. The public housing is either built or not built. The only unknown is the extent of any impact that such construction will have on Homeowners in the future. However, the inability to quantify such impact and the possibility that it might grow in subsequent years only makes the potential impact more unlimited in scope.

Fourth, the impact on Homeowners will not be "diffuse" if the public housing deteriorates. One can debate whether this will occur, but the history of public housing in Dallas shows the possibility cannot be dismissed.

Finally, and perhaps most importantly, in this case there *is* an effective alternative. Section 8 housing has far less impact than new construction on neighborhoods and on adjacent homeowners because it utilizes existing apartments. The existence of this alternative affects the entire balance of hardships between the facts in this case and the facts in *Paradise*. Here the harm is "unnecessary" and "disproportional" because of the existence of a viable alternative that has not been given an adequate chance to accomplish desegregation.

Given the very significant differences between the nature, duration and scope of the impact of a race-conscious remedy in this case and in *Paradise*, there is no basis for the claim that the Fifth Circuit has "drastically lowered" the standard for impermissible impact on third parties set out in this court's decisions. What Petitioners are really quibbling about is the application of settled principles to specific facts. That is not a sufficient ground for review by this court.

V. THE FIFTH CIRCUIT DID NOT INTERFERE WITH THE SOUND DISCRETION OF THE TRIAL COURT.

In *U.S. v. Paradise*, 480 U.S. 149, 184 (1987), this Court recognized that "the choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." The Fifth Circuit expressly acknowledged this limitation, saying: "we are mindful of the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." App. 28. However, the Fifth Circuit noted that the district court's equitable powers "remain constrained by the boundaries of narrow-tailoring", App. 28, an approach consistent with the requirement that the district court's discretion must be exercised "within appropriate constitutional and statutory limits." *Paradise*, 480 U.S. at 184. In concluding that Petitioners had not provided sufficient evidence of the necessity for a race-conscious remedy at this time, the Fifth Circuit did not interfere with the district court's discretion as Petitioners suggest.

First, Petitioners' claim that the Fifth Circuit rebalanced the equities between the feared injury to adjacent property owners and the steps taken to prevent it when such equities had already been balanced by the district court. But a reading of Petitioners' references to the district court's decision show that the balancing

conducted by the district court was not the balancing required by the *Paradise* case.[12]

Under the *Paradise* case, the district court was required to assess the impact on third parties in terms of its duration, scope, diffuseness, and the degree of control given to the affected parties in proportion to the availability or other remedies. No balancing of this type was undertaken by the district court.[13] The Fifth Circuit could not therefore have interfered with the exercise of the district court's "sound discretion" within appropriate "constitutional and statutory limits" because no sound

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[12] What the district court did was balance the safeguards on the projects to be built in white areas with the lack of safeguards in the projects that had previously been built in black areas. App. 88-89; 174. Such balancing is a specific application of the discredited theory adopted by the district court that Homeowners would have no equal protection claim unless they could first identify a similarly situated set of black persons who have been treated better. App. 171. The Fifth Circuit specifically rejected this equal protection theory as an incorrect legal standard in this case because it applies only where there is no explicit use of racial criteria. App. 16. Since the district court's findings on this issue were based on a "mistaken impression of applicable legal principles, the reviewing court was not bound by the clearly erroneous standard". *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 855, n.15 (1982); *United States v. Bently-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993).

[13] The district court did find that the "impact on the Homeowners near the sites will be *comparatively* minimal and diffuse." App. 204. (emphasis added). However, the district court never gave reasons for this conclusion nor stated to what the impact was being compared. The only comparison that can be found is the comparison to the impact on blacks in black areas of the city which has no constitutional significance.

discretion within the appropriate constitutional limits was ever exercised.

Petitioners also argue that the district court provided a specific means to allow Section 8 vouchers to substitute for future allocations of public housing in white areas once the defendants could show that Section 8 would ensure housing in white areas. Pet. at 20. But the district court reversed the burden of producing evidence on this issue. It was Petitioners, not Homeowners, who had the burden to offer evidence showing that a race-conscious remedy like new construction in white areas of the city was necessary to achieve racial integration. App. 19-20. The Fifth Circuit correctly rejected the district court's misapplication of the burden of production and therefore owed no deference to any conclusion reached on that basis. App. 20.

Petitioners next complain that the Court of Appeals "ignored" the long record of neighborhood opposition to public housing in white areas. Pet. at 20. But Petitioners never explain how this opposition would have justified the use of new construction instead of Section 8 housing (certainly the opposition to new construction would be no less than opposition to use of Section 8 vouchers) nor do Petitioners explain how "ignoring" this fact interfered with the exercise of the district court's discretion.

Petitioners also complain that the Fifth Circuit overlooked findings that DHA historically segregated Hispanics by race. Pet. at 21. But Petitioners never explain how the district court's order which excludes Hispanics and "other minorities" from eligibility for public housing

in their areas will remedy any wrong against either Hispanics or Blacks. Similarly, Petitioners never explain why other minorities, e.g., Asians, are included in the district court's remedy when there are no findings of discrimination as to any other minorities. As the Fifth Circuit noted:

> This suit was brought by black plaintiffs on behalf of a class of black plaintiffs. There is no suggestion that the suit was ever expanded to include all minorities . . .

App. 32.

Finally, Petitioners contend that the Fifth Circuit incorrectly characterized the Section 8 voucher program as "race neutral", when the Section 8 mobility program that accompanied the successful movement of blacks into white areas "is explicitly race conscious." Pet. at 21-22. This argument is disingenuous.

The Section 8 program that successfully moved black families into white areas between 1994 and 1996, App. 25, is clearly race-neutral in terms of site-selection criteria. *See* App. 56, 91, 113 ("No Section 8 participant is denied the right to use the Section 8 assistance *in any areas.*") (emphasis added). Furthermore, as the district court noted, "There are no race-conscious limits on who gets Section 8 or any racial preferences for applicants of any race." App. 91.

The *only* aspect of Section 8 that is race-conscious is the mobility program. Mobility services are simply counseling services to help public-housing tenants find Section 8 housing. App. 6, n.6; 90-91. Blacks get counseling for use of Section 8 vouchers only when they are used in white areas. They do not get such services if they choose

to live in black areas "because there is no record that black Section 8 participants encounter any problem finding housing in minority areas." App. 91. Likewise, white participants do not get mobility services "because there is no record that white Section 8 participants encounter any problems finding housing in white areas." App. 91. Thus mobility services are tailored to those circumstances where they are shown to be needed.

The fact that race plays a minor role in the dispensing of counseling services in no way undermines the legitimacy of the Fifth Circuit's distinction between the race-conscious order to locate new construction in "white areas" and the race-neutral use of Section 8 vouchers which can be used in "any area." Thus, in terms of site selection, the remedy of new construction in the district court's order is clearly "race conscious" whereas the use of Section 8 vouchers is clearly "race neutral." The fact that there is a racial component to the counseling services is, from a legal perspective, irrelevant to the issues in this case.

Finally, Petitioners argue that the Fifth Circuit improperly limited the scope of the district court's discretion. Pet. at 19. In some cases this might be true. However, in this case it is most disingenuous to stress the exercise of the district court's sound discretion when the district court's entire Memorandum Opinion, App. 66-228, was copied verbatim (together with typographical errors) from Petitioners' Proposed Findings of Fact and Conclusions of Law. As the Fifth Circuit noted, the district court's opinion "[A]dopt[ed] the Walker plaintiffs' proposed findings of fact and conclusions of law *in toto*." App. 24. While there may be cases in which a Court of

Appeals has interfered with the sound discretion of a district court, this is not such a case. Indeed, this case would present a particularly poor vehicle through which to emphasize the deference to be accorded a district court's judgment when the trial court squandered most, if not all, of its discretion by ceding to Petitioners' counsel the difficult and delicate constitutional task of balancing the competing interests of the respective parties.

CONCLUSION

The Fifth Circuit properly reversed this case and remanded for further proceedings. That result was correct and presents no issue of sufficient importance to merit this Court's review. Petitioners' Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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Attorney for Respondents

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HIGHLANDS OF McKAMI, et al.,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 3-96CV1866-R
HOUSING AUTHORITY OF THE CITY OF DALLAS,	)	
Defendants.	)	

ORAL DEPOSITION OF ALPHONSO JACKSON
TAKEN ON AUGUST 29, 1996

REPORTED BY: Tina Young
Tina Young & Associates
7122 Jack Franzen
Corlana, Texas 75043
(214) 226-6365

* * *

[p. 8] PROCEEDINGS
MR. MELSHEIMER: Under the Rules.
ALPHONSO JACKSON,

having been first duly cautioned and sworn upon his oath to tell the truth, the whole truth, and nothing but the truth, testified as follows, to wit:

* * *

EXAMINATION

* * *

BY MR. MELSHEIMER:

Q. Mr. Jackson, would you please state your name for the record.

A. Alphonso Jackson, A-l-p-h-o-n-s-o, J-a-c-k-s-o-n.

Q. Mr. Jackson, my name is Tom Melsheimer. We met immediately prior to starting here today. And do you understand that I represent a group of homeowners who have filed suit in Judge Buchmeyer's court in a case that has been consolidated with the Walker case, and it's a case in which they're essentially challenging the construction of public housing in their neighborhoods. Are you familiar with that case?

A. Yes.

[p. 9] Q. You understand that's the case we're here take your deposition in today?

A. Yes.

Q. How are you currently employed?

A. I am the vice president of Corporate Resources for Central and Southwest Energy, an International Corporation.

Q. And how long have you held that position? I think it's only a couple of months, isn't it?

A. About five weeks.

Q. It's nice they would give you time off to come do this after five weeks, huh?

A. I didn't have a choice.

Q. Can I dispense with the normal admonitions with respect to a deposition? I assume you've had your deposition taken before?

A. Yes.

Q. And you understand that everything you say here is under oath, and is being taken down by a court reporter, just as if we were in court today?

A. Yes.

Q. And if I misstate anything or ask a question that you don't understand, would you

* * *

[p. 10] please feel free to correct me or ask me to clarify a question?

A. Yes.

Q. What was your job immediately prior to going to Central and Southwest?

A. I was the president and CEO of the Dallas Housing Authority.

Q. How long did you hold that position?

A. Approximately seven and a half years.

Q. When did you go to work for the Dallas Housing Authority?

A. January 1989.

Q. Did you go to work as the president and CEO?

A. At that time it was the executive director, but that's the equivalent.

Q. You had the same duties as executive director as you had as president and CEO?

A. Yes.

Q. Can you just describe for me briefly the duties and responsibilities of the president and CEO of the Dallas Housing Authority?

A. The responsibilities are -- is to manage the Housing Authority on a day-to-day basis, that is, to run the respective departments within the [p. 11] Housing Authority of the City of Dallas, housing, modernization, maintenance, client services, Section 8, et cetera, and to interface with the external community.

Q. Is it fair to say you were the boss of the Dallas Housing Authority?

A. I was responsible for all the activities of the Dallas Housing Authority.

Q. Anyone have any more responsibility than you?

A. No.

Q. Prior to coming to the Dallas Housing Authority in January of 1989, did you have any previous experience in the area of public housing?

A. Yes.

Q. What sort of experience did you have?

A. I was director of Housing for the District of Columbia and chair of the Redevelopment Authority.

Q. When did you hold that position?

A. From '87 to '89.

Q. Any other experience in public housing prior to DHA?

A. Yes, I was director of the St. Louis Housing Authority.

* * *

[p. 25] disbanded; and second, we would make every effort to disperse those certificates and vouchers to non-impacted areas in accordance with the consent decree; and that we would – we would do everything to maintain the buildings, the present conventional units, better than they had been maintained.

Q. Is it your understanding that there came time when the consent decree was vacated –

A. Yes.

Q. – or overturned?

A. Yes.

Q. What is your understanding of what led up to that?

A. I really can't remember.

Q. Okay. You understand that as a result of the vacation of the consent decree, that the Court entered a remedial order affecting DHA?

A. Yes.

Q. And that was in April of this year, or May of this year?

A. Yes.

Q. I want to ask you a little bit about the circumstances leading up to the remedial order. I'm sorry. I said May. It's February.

MR. WERNER: You got the year [p. 26] wrong.

MR. MELSHEIMER: And it's in February last year. I'm all messed up.

Q. (By Mr. Melsheimer) Just so we're clear on the record, you understand that the remedial order affecting DHA, which replaced effectively the consent decree, was issued by the Court in February of last year –

A. Yes.

Q. – '95? Let me show you what's been marked in a previous deposition as Exhibit 18. Do you recognize that as a true and correct copy of the Remedial Order Affecting DHA?

A. Yes.

Q. I want to focus your attention on that order, Mr. Jackson. Were there negotiations or conversations with the Plaintiffs that you participated in leading up to the entry of this order, Exhibit 18?

A. Yes.

Q. Can you describe for me the course of those conversations or negotiations?

A. Yes.

Q. When did they start?

A. I can't tell you exactly when they [p. 27] started.

Q. Was it sometime in 1994?

A. I – I can't specifically give you the date. I just don't know. I know it was about a year and a half before.

Q. Okay. So it could have been in late '93, but certainly in the late '93-'94 time period, you were involved in negotiations and conversations with the Plaintiffs with respect to what eventually became Exhibit 18?

A. Yes.

Q. Who participated in those negotiations?

A. Joe Werner, Mattye Jones, Lori Moon, Mike Daniels and his colleagues – I can't remember each – each person – Billy Daily, Bill Cerbone, Chris Wittmayer, Judge Buchmeyer, Special Master Louis Webber. I think that's – I think that's all.

Q. Can you summarize for me how – what you were negotiating about?

A. Sure. We were negotiating about how we – we would utilize the thirty-five hundred units or so that we had to replace with the demolition of Lakewest. You know it as West Dallas. And the negotiations started at whether [p. 28] we, from the Plaintiffs and Plaintiffs' attorney's position, whether we build thirty-five hundred units; or whether we bought thirty-five hundred units; or whether we used some section 8 certificates and some Section 8 vouchers; whether we had some conventional units built. It was trying to come down, because as I've said on a number of occasions, I didn't see how we could

build or buy thirty-five hundred units in North Dallas. So we started negotiating.

Q. The thirty-five hundred unit number, where did that come from?

A. I'm not sure.

Q. Was that a part of the – what the Court had ordered with respect to new units?

A. You know, I'm – I'm not – I think that it was – it was the replacement units to North Dallas from Lakewest, plus some new units. I'm just not as familiar as I used to be with it.

Q. I can certainly understand that. And I'll try not to refresh your recollection too much, because I'm sure your diminished one is far superior to mine. But in any event, can you summarize for me DHA's position in those negotiations? And if it changed, tell me that, [p. 29] too. But you've described a negotiation process over how these thirty-five hundred units were to be demolished. What was DHA's position with respect to those thirty-five hundred units?

A. Well, at first, our concern was: How do we replace them? Do we replace them – we replace some on that site? Do we build all of them outside of that site? Speaking for the agency, I just didn't think we could find thirty-five hundred units or build thirty-five hundred units in North Dallas.

Q. Why not?

A. I don't – I didn't think the land was there nor the units were there.

Q. By units being there, do you mean pre-existing units?

A. Pre-existing units with the size that we needed.

Q. And when you say "the size that you needed in pre-existing units," you mean the prospect of DHA buying a pre-existing building and converting that to public housing?

A. No. Whether there were apartment complexes or duplex complexes that could house two-, three-, four-, five-bedroom families. It was [p. 30] my perception that they didn't exist. We had two – we had had success with two bedrooms, but we had not had that kind of success with three, four, and five bedrooms.

Q. When you're talking about these thirty-five hundred units, are you talking about public housing replacement units and Section 8?

A. Our position was, is that we couldn't – I didn't believe, and I still don't believe, that we could have found or built thirty-five hundred conventional units. So, therefore, we sat down with the Plaintiffs and the Plaintiffs' attorney and tried to come to some agreement where some would be conventional units and some would be section 8 certificates and vouchers.

Q. So when you say the thirty-five hundred units was an unattainable number, you mean any combination of construction and Section 8 in North Dallas wasn't going to lead to thirty-five hundred units?

A. No. that's not what I said.

Q. Okay. Please –

A. I said when we started out, it was my understanding that the Plaintiffs and the Plaintiffs' attorneys wanted thirty-five hundred [p. 31] units. Those were conventional units. I felt that that was impossible –

MR. WERNER: Thirty-five hundred structures as opposed –

THE WITNESS: Thirty-five hundred structures.

MR. WERNER: – to some combination of structures and Section 8?

THE WITNESS: Right.

A. I felt that that was impossible to accomplish. So I asked our lawyer to permit us to – and the Court did, too – to negotiate with the Plaintiffs to try to have some mixture of both certificates, vouchers, and conventional housing.

Q. (By Mr. Melsheimer) I see. Just so I'm clear, the impossibility was that there wasn't going to be a way to find structures in North Dallas to house thirty-five hundred units of public housing?

A. To have structures or to build.

Q. Or to build the thirty-five hundred units. And, therefore, you, on behalf of DHA, sought to have that thirty-five hundred number comprise some new construction, some purchase of pre-existing structures, and some Section 8?

[p. 32] A. Yes.

Q. Other than your belief that there wasn't thirty-five hundred units in North Dallas –

MR. WERNER: That's not what he said.

Q. (By Mr. Melsheimer) Well, and let me try to get it straight. Other than your belief that there weren't thirty-five hundred – you weren't going to be able to accommodate thirty-five hundred units in North Dallas through the use of construction or buying pre-existing units, was there any other reason why you wanted to see that number comprised of new construction, pre-existing buildings, and Section 8?

A. Yes.

Q. What were those reasons?

A. The fair market rents. If we found houses in the communities that the agreed order of the consent decree or the – later the remedial order talked about, most of the time they are out of our FRM's – well, the fair market rent area. I mean, we're only allocated so much money that we can pay for a three-bedroom or four-bedroom or a five-bedroom. And so, therefore, if you have a four-bedroom going for two thousand dollars in that [p. 33] area, we can't afford to rent that apartment complex.

So my answer to that is, let's try to find a mixture of Section 8 certificates and vouchers, new construction, and buying. And hopefully in the process of buying, we would – we would be able to adequately accommodate the needs of the thirty-five hundred people.

Q. Did you have any policy considerations with respect to the new construction versus Section 8 that, for example, you thought that additional Section 8 would just be a better idea as a matter of policy, or was it all just a matter of availability?

A. Well, are you asking me my opinion?

Q. Yes.

A. Oh, I think Section 8 is excellent. There's no question that it's an excellent program. But the problem is, from a pragmatic point of view, you can't address the needs of the families that exist presently on our waiting list in the Housing Authority.

Q. Why is that?

A. Because we have three, four, and five bedrooms and the fair market rent does not equate

* * *

[p. 46] Q. You couldn't do all those units, in your judgment, in North Dallas under Section 8 because for the reasons that we discussed, they weren't available?

A. No. That's not what I said. I said that we had, between us, the Plaintiffs, and the Plaintiffs' attorney, experienced a spirited debate about what number would be conventional, what number would be Section 8. I understood clearly why the Plaintiffs and the Plaintiffs' attorneys was not going to let us have all Section 8 units. They felt that some of them should be replaced with conventional units.

Q. Was that based on your - did you understand them to want new construction because of they knew what you knew about Section 8 in North Dallas or some other reason?

A. I am convinced he's a very bright man. He knew the market was not there. In fact, he probably knows better than I do.

Q. The negotiations, then, were basically a negotiation between DHA, the involvement of the other parties and the Plaintiffs, with respect to how these thirty-five hundred units were going to be allocated?

[p. 47] A. That's correct.

Q. During the course of the negotiations, did you conduct any survey, like the housing opportunities survey, to determine how much of Section 8 could be borne in nonimpacted areas?

A. I honestly can't remember that. We might have. I don't know.

Q. Wouldn't that have been an important thing for you to know in terms of determining how much Section 8 could be used?

A. Oh, I think it's an important factor, but at the same time there were other factors. And the other factors to me, at that point, were more important. That is, to try to get an agreement with the Plaintiffs and the Plaintiffs' attorney. That was the most important thing to me, because I just did not believe that there was ample room to build or to buy thirty-five hundred units.

When I started out the process, if you asked me: "Did I have the data?" No. It was a gut feeling that they were not there. And I think it would have been a little premature on our part to talk about, "Yes, we can find land and build thirty-five hundred units or buy thirty-five hundred units."

* * *

[p. 48] Q. With respect to the Section 8 issue, though, and the availability of housing in nonimpacted areas, you don't know whether or not you did any kind of study during the negotiations as to what the availability was?

A. I just don't remember.

Q. We have been using North Dallas and nonimpacted areas sort interchangeably but, in fact, that's not the same thing, right? North Dallas and nonimpacted are not synonymous in the sense –

A. That's correct.

Q. – That there are areas that are nonimpacted that are outside of North Dallas, correct?

A. That's correct.

Q. Would your answers be the same concerning the availability of Section 8 housing in North Dallas, if we include North Dallas and all the nonimpacted areas, that there's just not – for the reasons you've stated, not enough, and when they are available, there's not enough money? We're talking about nonimpacted areas as a whole, including North Dallas.

A. If you're talking about the suburbs, I

* * *

[p. 50] A. People don't want public housing residents in their community.

Q. Excluding the suburbs, okay, nonimpacted areas, North Dallas, anywhere else in Dallas, your view that

there's not going to be sufficient – or let's go back to – let me strike that.

The process of the negotiation leading up to the remedial order in February of '95, it's your view that there simply were not enough units, for the reasons that you've stated, in nonimpacted areas to satisfy the thirty-five hundred allocation?

A. Well, there's a – there's a bit more that we're talking about with these units. There were some percentages that we agreed upon that had to be represented when we were talking about where the units would go in North Dallas. And I've forgotten that figure. I think it was – it has to be thirty-five percent or less African-American and Hispanic population. It had to be thirteen percent or less poverty. And so that relegated to where we would go, even though we had some nonimpacted areas that might be sixty percent. But in the agreement that we reached, they did not qualify areas where the four hundred and seventy-four units would [p. 51] go.

Q. Where did the numbers – with respect to poverty, crime rates, and percentage of African-American population, where did those numbers come from?

A. Census data.

Q. But where did the numbers that you agreed upon come from in the sense of what was the basis for choosing –

MR. WERNER: Why thirteen percent or why sixty-five percent?

A. Oh, I can't – I can't remember. I know. I just can't remember at this time. I know – I would have to refresh. I just don't remember.

Q. (By Mr. Melsheimer) Were those numbers that you proposed on behalf of DHA?

A. No.

Q. Were they numbers that the Plaintiff proposed?

A. Yes.

Q. Including all the requirements in the agreement with respect to poverty rates and percentage of African-Americans and crime rates, limiting it to those areas, it's your view that [p. 52] there simply weren't enough Section 8 units available for the reasons that you've stated?

A. For the reasons that I stated, and second of all, I thought that to get the Plaintiffs and the Plaintiffs' attorneys from thirty-five hundred units down to there, I – I really thought that they had given an awful lot. That's just my personal opinion; I thought they had given an awful lot. And I think to keep asking and asking and prolong the negotiation would have been frivolous because we might have been back up to thirty-five hundred units.

Q. I'm sorry. I think I missed you there. To get them down from thirty-five hundred units, down from what?

A. From thirty-five hundred units to basically four hundred and seventy-four units of conventional housing and the rest in certificates and vouchers – I'm sorry, with two hundred units being permitted to be in Lakewest. I think it's two hundred units.

Q. So in your view, the Plaintiffs had given in so significantly on the thirty-five hundred number down to four hundred and seventy-four new construction units, that it simply wasn't – you [p. 53] weren't going to get anything more out of this. Is that what you're saying?

A. I think they had given more than I expected to get out of them when we started negotiating.

Q. In this negotiation process, when you finally arrived at that four hundred and seventy-four number, did you make any assessment at that time whether four hundred and seventy-four units – let's put aside whether or not the Plaintiffs would agree to it, but whether or not four hundred and seventy-four units could have been accommodated through the Section – use of Section 8 in North Dallas?

A. That was a decision the Court had to make. We did the negotiation. We presented it to him, and it was clear from my perspective that we were not going to leave that negotiation without having some conventional units, period. I think the Plaintiffs and the Plaintiffs' attorney made that very clear, we had to have some conventional units.

Q. And I'm not trying to ask a hypothetical question. I am just trying to ask, did you do any analysis or study or determination at that time [p. 54] with respect to whether or not four hundred and seventy-four units could be accommodated through the use of Section 8?

A. But it is a hypothetical question. We started out the negotiation talking about thirty-five hundred conventional units. We knew in the beginning of that negotiation

that we were going to have some conventional units. We didn't know whether they were going to be four hundred and seventy-four, whether they were going to be five hundred, or whether they were to be a thousand. We knew we were going to have them. So to say that we did an analysis of whether this could have been converted to something else is absolutely of no value. We knew we were going to have conventional units.

Q. And because you knew that, you didn't do any such determination or study about Section 8. Is that a fair statement?

A. No, because we had Section 8 involved in that.

Q. I understand that, but with respect to whether or not the final four seventy-four could have been accommodated through the use of Section 8, you didn't do any determination as to [p. 55] whether or not that would – that could be used as Section 8 in North Dallas because you didn't think it made any sense to do it?

A. Didn't make any sense to do it.

Q. And you didn't do it?

A. No. It didn't make any sense. I think I made it clear to you that we started off with thirty-five hundred conventional units. We knew from the very beginning that the Court had said for us to get together and try to come up with an agreement that would be acceptable to the Court. It took us a year and a half to get there. And my position is, is that to get the Plaintiffs to agree to come down from where they were to where we were was absolutely surprising to me. Okay?

Q. Where did the thirty-five hundred number come from?

A. I can't remember. I still can't remember.

Q. Did that come from the Court?

A. I still can't remember.

Q. Did you ever give any consideration of going to the Court and – strike that.

Did DHA ever make a proposal to the Plaintiffs – in the year and a half of [p. 56] negotiations leading up to the '95 remedial order, did DHA ever make a proposal to the Plaintiffs or counterproposal that included no new construction?

A. No.

Q. Why not?

A. Because from my perspective, knowing what I know about the market, there was no way in the world we were going to find thirty-five hundred units in Section 8 certificates and vouchers. They're not there, not in the – not according to the guidelines that we set up, they're not in North Dallas.

Q. Or in any other nonimpacted area with the crime and minority population and poverty rate percentages as required?

A. I can't speak for the counties because – again, you're asking me to speak for the counties. I can't – I can't speak for them because we don't have the right to go there.

Q. Anywhere else in Dallas?

A. No. I mean, are you – yeah. There are other places. Yeah. We could have – we could have found thirty-five hundred certificates and vouchers in Dallas, but the bulk of them would have been in impacted areas.

[p. 57] Q. Did DHA ever make a proposal to the Plaintiffs that did not contain a racial component as to where the new units had to be located?

A. I'm sorry. You got me on that one.

Q. Well, it's hard to ask questions. Joe – it's easy for Joe because he's been in this seven years. I should –

MR. WERNER: Do you want me to ask them for you?

MR. MELSHEIMER: Well, actually I should, but it's going to be so embarrassing when it comes out in the record. Give me one more shot at it, then I'll see –

Q. (By Mr. Melsheimer) Did you ever propose to the Plaintiffs or to the Court a settlement solution in the Walker case that did not involve a race conscious site selection method; i.e., choosing the site where the housing would be built based on the population?

MR. WERNER: Without regard to the racial makeup of the neighborhood where the new project would go.

THE WITNESS: I'm still not sure what he's asking.

[p. 58] MR. WERNER: Do you want me to ask it?

MR. MELSHEIMER: Yeah. Try it.

MR. WERNER: He wants to know, did you ever give any consideration to putting new public housing construction in neighborhoods without regard to the racial makeup of the neighborhood where you put it?

A. No.

Q. (By Mr. Melsheimer) Why not?

A. Because we had an agreement, that became the remedial order, that said we would look at areas that were thirteen percent less poverty, thirty-five percent less African-American or Hispanic. And we knew where those areas were. That's the only guideline. It wasn't based on race. It was based on – on poverty and where there wasn't a concentration of African-Americans and Hispanics.

Q. Well, but that's a racial component, correct?

A. I don't think that's racial. I mean, I think that's – you can say it's racial. I think racial is building all of those developments in [p. 59] South Dallas. That was a conscious decision on the City part – part of the City.

Q. Well, we can say that's racial, too, can't we?

A. No, that is. That is.

MR. WERNER: May I?

MR. MELSHEIMER: Well, let me – I don't want to have you – I don't want you to bill my clients.

MR. WERNER: Oh, I'll promise you I won't bill them, depending on how the case turns out. I won't bill them for this question specifically.

MR. MELSHEIMER: I appreciate that, Joe.

MR. WERNER: I'll give you an offset.

Q. (By Mr. Melsheimer) The site selection process that DHA undertook for these new public housings has a racial component in terms of the neighborhood?

A. I'm not sure what you're asking.

Q. Well, you chose sites, looked for sites in areas that were predominantly white.

A. That's true. But African-Americans – [p. 60] African-Americans, Asians live in those areas, unlike South Dallas, where you won't find them.

Q. And I guess – I'm not trying to argue with you about the –

A. No, I'm not arguing. But I'm saying to you that –

Q. – the percentages. I'm just saying that you understood that DHA, in connection with the negotiations leading up to this remedial order, agreed to look for sites using a bunch of different criteria –

A. That's correct.

Q. – but that one of the criteria was that they would look for sites for new construction in areas that were predominantly white?

A. Yes. Correct.

Q. As a policy matter, based on your experience in public housing, do you believe that Section 8 is an overall more effective use of public housing dollars than construction of public housing?

MR. WERNER: The question is, is it more effective?

MR. MELSHEIMER: Yeah.

A. Yeah. That's a very difficult question.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	*	
	*	
v.	*	3:85-CV-1210-R
U.S. DEPARTMENT OF	*	CLASS ACTION
HOUSING AND URBAN	*	
DEVELOPMENT, ET AL.,	*	
	*	
and	*	
U.S. DEPARTMENT OF	*	
JUSTICE.	*	

PLAINTIFFS' MOTION TO MODIFY THE MODIFIED REMEDIAL ORDER AFFECTING HUD

Plaintiffs move the Court to modify the Modified Remedial Order Affecting HUD as set out below. The modifications are those made necessary by the 5th Circuit's recent opinion in *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999). The justification for each modification is set out below the modification and in the memorandum filed in support of this motion.

Proposed modifications to Modified Remedial Order Affecting HUD

Vestige A. same.

A.1. same.

A.2. replace with the following:

A.2.1. HUD shall use its discretion to accomplish the remedial goal of creating 3,130 units of family public

housing in sites that sites, units, projects, and neighborhoods which must provide housing opportunities and neighborhood conditions substantially equivalent to the sites, units, projects, and neighborhoods in and around the HUD assisted projects located in predominantly white areas in the Dallas Metropolitan area. These are the projects listed on the attached "HUD subsidized – non-public housing – Dallas and Collin Counties" list that are identified as located in "borderline" or "nonimpacted" locations. The units may not be located in census tract block groups where the poverty rate exceeds the average % of poverty for Dallas County under the most recent U.S. Census.

For purposes of this decree, "public housing" includes traditional low rent public housing, Section 8 project based housing assistance, or other forms of housing assistance which are unit based rather than tenant based and which provide housing on terms substantially equivalent to the terms on which traditional low rent public housing is available. "Public Housing" does not include tenant based Section 8 certificates or vouchers. "Predominantly white areas" has the meaning set out in ¶ A.6.2. of this order. "Area" means the geographic area within a quarter mile radius of the center point of the the [sic] proposed location of the project.

The number of units needed for a desegregated balance of opportunities was not reversed or affected by the 5th Circuit opinion.

The race conscious "predominantly white" provision is removed. The requirement that the conditions and

neighborhoods for the new public housing units be substantially equivalent to the conditions and neighborhoods of the HUD assisted projects located in predominantly white areas was also in the original order and was not reversed or affected by the 5th Circuit opinion. The present unequal neighborhood conditions between DHA's predominantly black projects and the predominantly white HUD assisted projects are one of the existing effects of the de jure segregation and must be addressed by the remedial order. The only race conscious element is in the identification of the neighborhoods where the HUD assisted projects which will be used as a standard for the site selection are located. This race consciousness is no more than that required when remedying any racial discrimination. Race must be taken into account even when coming up with a race-neutral remedy. The poverty criterion was not reversed by the 5th Circuit.

A.2.2. No site will be approved by HUD for any form of unit or project based DHA public housing without prior court approval under the standards set out in this order.

This provision ensures that any new sites for DHA project based assistance meet the remedial desegregation standards.

A.2.3. The sites for all additional public housing units, including those funded under the HUD HOPE VI program, and all additional units receiving any form of unit or project based assistance, including project based Section 8 assistance, shall comply with the same site selection standards as those contained in 24 CFR § 941.202.

The HUD site selection criteria were not challenged by the homeowners and were not overturned by the 5th Circuit. It is necessary to include the HUD criteria into the remedial order to prevent a conflict between the court order and the HUD criteria. Such a conflict could result from HUD refusing to approve a site that otherwise met remedial criteria but which did not meet the HUD site selection criteria

A.2.4. HUD shall implement these site and neighborhood standards and all of its housing development activities in a manner that will ensure the desegregated construction or acquisition of any new public or other forms of publicly assisted housing owned, operated, financed, or in any way assisted by DHA.

This language incorporates the 5th Circuit ruling that race-neutral criteria "will ensure the desegregated construction or acquisition of any new public housing."

A.2.5. Without prior court approval, HUD shall not approve any plan for DHA's sale, lease, encumbrance, or other transfer of any ownership interest in any property currently owned or leased by DHA or by any DHA affiliate or related corporation or other entity. This does not apply to the leasing of public housing or other low-income housing units to qualified tenants or to the sale of the Turnkey III units to qualified households. The standard for court approval is whether the proposed transaction is consistent with HUD's and DHA's constitutional duties to eradicate the effect of past segregation to the extent practical and to prevent future discrimination related to the past segregation.

This term is made necessary by the 5th Circuit's elimination of the race conscious site selection criteria. DHA owns several inner City located properties which because of demographic changes are in neighborhoods that are either becoming whiter or have the potential to become whiter. DHA also owns a few units that are in white areas. The race-neutral site selection criteria could result in the demolition and disposition of these sites and their replacement in minority areas which would further rather than eliminate the effects of past segregation. The provision ensures that any sale or other disposition of DHA property does not perpetuate racial segregation.

A.2.6. Without prior court approval. HUD shall not approve any plan for the demolition or removal from the inventory of subsidized public housing inventory of any DHA public housing unit. The standard for court approval is whether the proposed transaction is consistent with HUD's and DHA's constitutional duties to eradicate the effect of past segregation to the extent practical and to prevent future discrimination related to the past segregation.

This term is justified by the same reasoning as A.2.5. above.

A.2.7. With the exception of the 50 units of low rent public housing already used in the reconfiguration of the West Dallas project, HUD shall not approve the use in West Dallas of any of the 674 units of new public housing funding already allocated to DHA.

The use of race-neutral site selection criteria clearly leaves minority areas open for public housing development. The use of additional units in West Dallas would

make any balance of opportunities even more difficult. Under the previous decree, the use of race conscious criteria for most of the new units limited the impact of locating some of the units in the high poverty, minority concentrated West Dallas project.

A.2.8. HUD shall use its best efforts to ensure the complete development and full initial occupancy of the 549 remaining units of the 674 units of new public housing funding already allocated to DHA within two years of the date of this order. HUD shall use its best efforts to complete the development and achieve full occupancy of the total 3,130 units within 7 years of the date of this order. If these deadlines are not met, plaintiffs may apply to the Court for additional relief.

Funding for 335 of the existing allocation of new units was awarded in 1990 and 1991. The remaining units were allocated in 1994 under the West Dallas HOPE VI program. The delay of over a decade is too long. DHA is already in noncompliance with the time limits in the original order. These deadlines are necessary to secure the development of the units.

A.2.9. All units of public housing developed, acquired, or otherwise assisted by DHA shall be leased to tenants according to tenant selection and assignment procedures approved by the court. The tenant selection and assignment procedures shall afford African-American residents of and applicants for DHA's family public housing units the first and highest priority in occupancy for all newly developed units meeting the site and neighborhood standards in this order.

This provision ensures that the class members suffering from the existing effects of racial segregation are the ones first in line for any new desegregative housing opportunities developed under the race-neutral criteria.

A.2.10. HUD is permanently enjoined from approving sites for the location of housing units assisted through any form of DHA assistance for the purpose or which would have the effect of creating, maintaining, or perpetuating racial segregation in the housing receiving its assistance.

This provision simply states HUD's legal obligation to avoid future sites which would continue the previous violation of de jure racial segregation HUD's obligation is to ensure desegregation even if race-neutral criteria are being used.

A.2.11. HUD shall use its discretion to accomplish the remedial goal of this section as soon as possible consistent with the statutory mandates governing the allocation of HUD assistance. HUD shall also exercise its discretion under its various housing programs to create and develop housing alternatives in areas and neighborhoods in Dallas County, Texas and adjoining areas which will give African-American applicants for and participants in DHA's low income housing programs access to desegregated housing opportunities.

This the same as A.2 in the Modified Remedial Order Affecting HUD.

A.3. through A.5. the same.

A.6. renumber to A.6.1.

Add A.6.2. A predominantly white area, as this term is used in this order, is determined by first computing the racial composition of the geographic area within a one-quarter mile radius of the center point of the proposed location of the unit. If the population, using the block level data for the most current U.S. Census, is less than 37% total non-Hispanic African-American, Hispanic, or other minority persons, then it may be a predominantly white area. The area is not a predominantly white area if it is located on or near a dividing line, such as a highway, major thoroughfare, or railroad tracks, between a predominantly white area and a racially concentrated minority area. The area is not a predominantly white area if it is located in an isolated, non-residential area.

A.6.3. If a plan under this section is not approved and successfully implemented within 5 years from entry of this order, plaintiffs may apply for additional relief.

This will give HUD until 2004 to submit and implement a court approved Section 8 substitution plan. This plan is still race conscious because the 5th Circuit opinion cited to it as evidence that a race conscious public housing remedy was not needed. Since the 5th Circuit held the Section 8 substitution plan to be an acceptable alternative to race conscious site selection, then if it does not produce desegregated housing opportunities within a reasonable time, race conscious site selection should be reinstituted under the 5th circuit rationale of giving Section 8 a chance to produce desegregative results before adopting race conscious site selection criteria.

The 37% minority guideline is justified given the record in this case showing the use of Hispanic and other minority areas to keep public housing out of white areas.

A.7. eliminate.

The actions identified in this section are no longer available given the 5th Circuit's ruling on the use of the race conscious site selection criteria. The 5th Circuit has also required additional actions before the race conscious site selection can be considered.

A.8. same, renumbered to A.7.

A.9. same, renumbered to A.8.

Vestige B. same.

B.1. through B.9. same

Vestiage C. same.

C.1. through C.3. same.

C.4. HUD shall prepare and submit for Court approval a plan for vigorous DHA mobility program with more mobility counselors and increased funding by HUD that serves the relocation needs and concerns of black families, reaches out to white landlords, affords adequate fair market rent exceptions, and combats illegal private discrimination.[1] The plan shall include:

a. consideration of the use of publicly assisted multifamily housing such as low income housing tax credit recipients or other federal, state and local government

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[1] Landlords other than white landlords may used to obtain housing in predominantly white areas.

assisted low and moderate income housing programs that offer units in areas which will further the accomplishment of the goals in ¶ C.2 of the Modified Remedial Order Affecting DHA.

b. reasonable modifications of the contracts, leases, and other forms used in the Section 8 program to encourage the participation of landlords with units in areas which will further the accomplishment of the goals in ¶ C.2 of the Modified Remedial Order Affecting DHA.

c. reasonable modifications of the procedures used in the Section 8 program to encourage the participation of landlords with units in areas which will further the accomplishment of the goals in ¶ C.2 of the Modified Remedial Order Affecting DHA.

d. regular communication between HUD, DHA and the other governmental and private entities enforcing fair housing laws on the identification of and elimination of illegal discrimination adversely affecting DHA's ability to accomplish the goals in ¶ C.2 of the Modified Remedial Order Affecting DHA.

e. actions to obtain or provide funding or other resources to eliminate other barriers to the accomplishment of the goals in ¶ C.2. of the Modified Remedial Order Affecting DHA such as the lack of child care, transportation, and high security deposits.

f. negotiations or consultations with landlords and landlord associations on issues such as income and employment requirements for tenants that limit section 8 participants' access to rental units. The negotiations or

consultations should focus on ways to serve any legitimate concerns of landlords while eliminating or reducing the barriers to Section 8 participants' access to rental units.

g. increased funding for both more vouchers and the mobility program, more mobility counselors, and higher fair market exception rents.

h. the goal of achieving and maintaining 65% of DHA's total Section 8 certificate and voucher allocation in predominantly white areas[2] of Dallas, the suburbs, and adjoining areas.

g. HUD's estimate of the costs of implementing DHA's Section 8 plan under C.6. of the Modified Remedial Order Affecting DHA, HUD's estimate of the costs of the HUD proposals for Section 8 under this order, the costs that can be paid for out of existing funding for the Section 8 program or other DHA funds, and identification of possible sources, including HUD funds, of funding for any costs which cannot be paid from existing sources and the steps necessary to obtain funding from those sources.

The plan shall be submitted within 60 days of the date DHA's plan is submitted to the Court. HUD shall implement the plan as approved or modified by the Court.

This provision reflects the 5th Circuit rulings that a Section 8 plan that is an alternative to a race conscious public housing site selection remedy must be vigorous.

[2] "Predominantly white" as defined in A.6.2. of this Order.

C.5. HUD shall determine whether or not fair market rent exceptions above 120% are foreclosed as a matter of law. If fair market rent exceptions above 120% are not foreclosed as a matter of law, HUD shall take all actions within its authority to implement the fair market rent exceptions above 120%. If fair market rent exceptions above 120% are foreclosed as a matter of law then HUD shall take all actions within its authority to fully implement 120% fair market exception rents. HUD's determination and actions may be reviewed by the Court on its own initiative or by motion of a party. HUD's determination and plans to implement the exception rents shall be made and provided to the Court and parties within 60 days of the date of this order. The plan shall be implemented in the form approved by the Court. HUD's actions to implement these exception rents shall be included in its reports to the Court and the parties.

This provision reflects one of the 5th circuit's preconditions for use of a race conscious public housing site selection remedy.

C.6. HUD shall prepare and submit a plan to the Court for the vigorous enforcement of federal laws prohibiting racial discrimination by private landlords who refuse to participate in DHA's Section 8 program. The plan shall be submitted to the Court within 60 days of the date of this order and shall be implemented by HUD as approved by the Court.

This provision reflects one of the 5th Circuit's preconditions for use of a race conscious public housing site selection remedy.

C.7. HUD shall prepare and submit a plan to the Court for increased funding for more Section 8 certificates and vouchers. The plan shall be submitted to the Court within 60 days of the date of this order and shall be implemented by HUD as approved by the Court.

This provision reflects one of the 5th Circuit's preconditions for use of a race conscious public housing site selection remedy.

Vestiage D. same.

D.1. same.

D.2. same.

E. [eliminate].

The 5th Circuit ruling has added actions which must be taken and which are not included in this section.

F.1. through F.3. same, renumbered to E.1. through E.3.

G.1. same, renumbered to F.1.

G.2. same, renumbered to F.2.

G.3. eliminate

The 5th Circuit ruling requires additional actions other than those in the Modified Remedial Order Affecting HUD. The ten year time frame in this section is no longer appropriate given the 5th Circuit's requirement that Section 8 and race-neutral site selection methods be implemented before a race conscious site selection remedy can be implemented.

G.4. same, renumbered to F.3.

G.5. through G.7. eliminate.

These provisions were based on the use of a remedy which included race conscious site selection and did not include many of the Section 8 program reforms ordered by the 5th Circuit. These provisions no longer fit the remedial obligations ordered by the 5th Circuit.

H. eliminate.

This provision is not consistent with the sweeping 5th Circuit ordered reforms to the Section 8 program and the other "helping hands" programs such as increased fair housing enforcement. While no funds can be spent in violation of the Congressional appropriations bills and statutory authorizations, there may be other funds within the discretionary control of HUD that could be used to comply with the mandates of the 5th Circuit.

I.1. eliminate.

I.2. eliminate.

These provisions were based on the agreement of plaintiffs and HUD to a remedial order that included the use of race conscious public housing site selection and that did not include the 5th Circuit mandated Section 8 reforms. The remedy revisions made necessary by the 5th Circuit ruling make these provisions inappropriate and inequitable to apply.

Respectfully Submitted,

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By: /s/ Michael M. Daniel
Michael M. Daniel
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Attorneys for Plaintiffs

Certificate of conference

I certify that a written conference on the subject of this motion was held by sending a draft of the proposed relief to counsel for the defendants in this case. No agreement could be reached.

By: /s/ Michael M. Daniel
Michael M. Daniel
Laura B. Beshara

Certificate of Service

I certify that a true and correct copy of the above document was served upon counsel for all defendants by being placed in the U.S. mail, first class postage prepaid, and on counsel for HUD by Fed Ex delivery on July 8, 1999.

/s/ Michael M. Daniel
Michael M. Daniel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	§	3:85-CV-1210-R
VS.	§	CLASS ACTION
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE, ET AL.	§	

REMEDIAL ORDER AFFECTING HUD

(Filed April 16, 1996)

In its findings of fact and conclusions of law,[1] this Court found the U. S. Department of Housing and Urban Development ("HUD") liable for its role (and the role of its federal predecessor agencies) in perpetuating and maintaining racial segregation in DHA's low-income housing programs. In response, HUD has proposed various remedial actions and it has provided or allocated significant resources for a final remedial order. This has been done by HUD Secretary Henry G. Cisneros, though several different versions of *"the Cisneros Plan"* which were submitted to this court for approval. For example, the best Cisneros Plan – "devised to fulfill two policy

[1] See *Order* Regarding Facts Established By Class Plaintiffs' Motion For Partial Summary Judgment Against DHA and HUD (filed May 26, 1994) and *Order* Granting Motion For Partial Summary Judgment Against DHA and HUD On The Issue Of Liability To The Class For Injunctive Relief (filed May 27, 1994).

objectives to which [Secretary Cisneros] is strongly committed: (i) improving the quality of living conditions for residents of the Lakewest Developments [*the West Dallas Housing Project*]; and (ii) promoting desegregation in DHA programs" – offered, among other things, some $65.7 million and $1.5 million in HUD funding for these two critical needs.

In response to the plaintiffs' objections, HUD made substantial changes to the Cisneros Plan, but the plaintiffs and DHA still have some objections to that revised plan. Addressing those objections, *this final Remedial Order approves the Cisneros Plan,* but with certain modifications necessary to eliminate the vestiges of racial segregation in DHA's low income housing programs.[2]

> **Vestiage A:** 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units[3] reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit #79]. 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit #79].

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[2] HUD's 9/27/94 exhibit #1 – Secretary Cisneros' Plan For The Revitalization Of The Lakewest Public Housing Developments And For Housing Assistance For The Dallas Metropolitan Area.

[3] These figures exclude the approximately 46 single family homes for which DHA does not separately report racial occupancy data [plaintiffs' 9/27/94 exhibit #68 – excerpt from DHA monthly report].

HUD is ordered to take the following actions to eliminate this vestiage of racial segregation:

A.1. HUD shall provide one-for-one replacement units, as defined by law, for each of the 2,630 units demolished in DHA's West Dallas project before the demolition of that unit. The 100 public housing units and 1,335 Section 8 certificates and vouchers previously provided by HUD are one-for-one replacement units. The 339 public housing units allocated to DHA since 1990 are one-for-one replacement units. The 335 public housing units allocated under the HUD Urban Revitalization Demonstration Grant are one-for-one replacement units. An additional 698 Section 8 vouchers will be provided by HUD,[4] and these will be one-for-one replacement units to the extent that HUD and DHA are proceeding with demolition under the previously approved demolition plan and if the number of units in the one, two, three, four, and five bedroom unit categories being replaced are matched in the allocations of replacement units. If a new demolition plan is approved, then the 42 U.S.C. 1437p prohibition against the use of vouchers as replacement units will apply.

A.2. HUD shall use its discretion, within the framework of 42 U.S.C. 1439(d), to accomplish the remedial goal of creating a comparable number of units[5] in predominantly white areas as soon as possible consistent with the statutory mandates governing the allocation of

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[4] As provided in a plan to be submitted to this Court by HUD.

[5] See Remedial Order Affecting DHA, ¶ A.3 (Feb. 7, 1995).

HUD assistance. In determining the formula needed pursuant to 42 U.S.C. 1439(d), HUD shall include as an objective, measurable condition affecting the allocation of units, the number of units needed to eliminate the vestiges of racial segregation for purposes of the determinations made pursuant to 24 CFR 791.402(b). This obligation also applies to reallocations of funding. The desegregation factor does not substitute for the other indicators of need in the formula but is in addition to those indicators. HUD shall also exercise its discretion under its various housing programs to create and develop housing alternatives and in areas and neighborhoods in Dallas County, Texas and adjoining areas which will give the African-American applicants for and participants in DHA's low income housing programs access to desegregated housing opportunities.

A.3. HUD shall request that the City of Plano and each suburb in Dallas County, except for Grand Prairie and Wilmer, enter into a cooperation agreement with DHA to allow the development of a reasonable number of public housing units in each suburb.

A.4. HUD shall request the assistance of Dallas County, Texas, as part of the County's compliance with its obligation to affirmatively further fair housing in its housing and community development related activities, in securing cooperation agreements between DHA and the area suburbs.[6]

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[6] Any cooperation agreements secured with Dallas County's assistance *should* be credited by HUD to Dallas County's obligation to affirmatively further fair housing.

A.5. If any suburb or Dallas County refuses to enter into cooperation agreements with DHA, HUD shall initiate an investigation to determine whether or not the refusal violates civil rights laws, HUD regulations, or other legal requirements.

A.6. Given the applicants' and residents' stated preference for Section 8 units, HUD is urged to devise and submit for court approval a plan which would use Section 8 certificates and vouchers to substitute for at least part of the future allocations of new public housing in predominantly white areas. In order to be approved by the Court, HUD's plan must:

> a. ensure that the Section 8 units are from an allocation over and above DHA's past allocations and over and above DHA's future fair share allocation and are not provided as a substitute for any units which would be provided to DHA under the normal allocation process. The housing assistance must be over and above what DHA or the City would otherwise receive from HUD, and can have no effect on the amounts of future assistance HUD may provide or award to DHA or the City, and
>
> b. ensure that the certificates and vouchers for which an offset against the new public housing development is claimed are and will be in use in predominantly white areas for the foreseeable future.

A.7. HUD shall perform the following functions with regard to the other HUD Assisted Housing in Dallas County and Plano:

a. Modification of Affirmative Fair Housing Marketing Plans

HUD shall direct the owners, operators, or managers of assisted housing developments in Dallas County, Texas and Plano which are located in census tracts with a non-Hispanic white population equal to or greater than 60% according to the most recent U.S. Census to adopt or amend their existing Affirmative Fair Housing Marketing Plan or Equal Housing Opportunity Plan within 90 days of the date of this Decree to include the following procedures:

(i) Each assisted housing development will include DHA and the City of Dallas Fair Housing Office as community sources to be contacted for applicant referrals, and specifically will recruit as applicants those African-Americans referred to it by HUD, DHA, or the City of Dallas Fair Housing Office.

(ii) The owner, operator, or manager will record, for each African-American applicant, the dates each person applied, the action(s) taken on each such application and date of each action, the dates of each offer of housing assistance made, whether the offer(s) are accepted, the date of any rejected or withdrawn applications, and the specific reasons given by the applicant for any rejection of an offer or withdrawal of an application. On request and at least annually, the owner, operator, or manager will provide a status report that shows its current vacancies, its waiting list, each African-American applicant's place on this list, a listing of each unit by bedroom size that

was vacated and/or newly occupied since the initial directive from HUD or previous report, all applicants to whom offers were not extended and the reasons therefor, and a designation of offers and acceptances as to each such unit by applicant name, as well as making available the record itemized above.

(iii) Subject to federal preference percentage occupancy requirements, the developments will give African-American applicants referred by HUD, DHA, or the City of Dallas a preference, equal to, but no greater than, the federal selection preferences that are accorded in the recipient-selection process to other applicants who, at the time they are seeking housing assistance, fall in the categories listed in 24 C.F.R. § 960.211(a)(1) or in other applicable HUD federal preference regulations. All developments subject to this requirement, however, shall cease giving those persons the priority and preference required here if and when the African-American occupancy equals of exceeds the greater of (a) the percentage of the African-American population in need of subsidized housing in Dallas County, Texas and Plano, or (b) 75 percent. If the class member preference is no longer required, each class member will continue to receive the same statutory or regulatory federal preference to which the class member would otherwise be entitled.

(iv) The development will determine every three months, the racial composition characteristics of those receiving its assistance and the racial composition of those on

the waiting list for its assistance, and HUD will determine annually, the racial identification of the area of neighborhood within which those receiving its assistance are located.

b. Notice.

HUD shall provide annualy [sic] to DHA and the City of Dallas Fair Housing Office for distribution to each African-American participant in the low income housing program operated by DHA and the City annually, a written notice of all HUD-assisted low-income housing developments in Dallas County, Texas and Plano that would offer those persons a desegregative housing opportunity because it is located in an area that is at least 60% non-Hispanic white according to the most recent census information available. HUD shall provide to DHA and the City of Dallas for inclusion in the annual notice:

(i) The full address, telephone number, and name of the person responsible for accepting applications for the development, a short description of the type of housing offered by the development, and the general eligibility requirements for the development.

(ii) The notice shall also include: (a) a provision that informs the recipients that, upon request, HUD shall refer, in writing, the name of the person to specific developments; that the developments will be under a duty to recruit that person to apply; and specifically what this duty requires; and (b) the telephone number of the HUD Fair

Housing and Equal Opportunity ("FHEO") Office that is designated to perform the functions set out in paragraph d. below, and a brief description of the functions to be performed by that Office.

c. Response to Complaints

HUD's Southwest Fair Housing Enforcement Center shall respond to complaints of discrimination or of violations of HUD applicant-selection procedures or of the various civil rights statutes applicable to transactions conducted under this Decree. It shall keep written records of the complaints and of all actions taken by HUD as a result of the complaints.

d. HUD Functions

HUD shall perform the following functions:

i) HUD shall maintain a written record of all referrals to assisted housing developments and the results of such referrals, and shall monitor the performance of assisted housing providers in extending offers to persons so referred.

ii) HUD shall designate specific personnel to respond to requests for information and requests for assistance from African-Americans on the waiting lists for or participating in DHA's low income housing programs desiring to obtain a desegregative housing opportunity. The assistance to be provided shall include referrals of those interested to public housing developments, and to programs other than low income public developments, that offer desegregative

housing opportunities in Dallas County, Texas and Plano.

A.8. HUD shall submit to the Court, within 90 days of the date of this order, its assessment of the feasibility of, advantages and disadvantages of, likely cost of, and obstacles or barriers to the operation of a Clearinghouse for the Dallas metropolitan area. By "Clearinghouse" is meant the Clearinghouse concept as set out in attachment B to plaintiffs' 9/27/94 exhibit # 2. Depending on the results of HUD's assessment and the comments of the other parties to the lawsuit, the Court may order the operation of such a Clearinghouse.

Vestige B: The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance [plaintiffs' 9/27/94 exhibits ## 62 – 66, 68 – 80]. *Walker v. HUD*, 734 F.Supp. 1231, (N.D. Tex. 1989).

HUD is ordered to take the following actions to eliminate this vestige of racial segregation:

B.1 HUD shall prepare and submit for court approval a schedule for funding and achieving the unit and project improvements necessary to make the unit and project conditions at DHA's projects substantially equal to the unit and project conditions at the HUD assisted projects located in predominantly white areas of Dallas. The following improvements shall be included in the schedule as part of the improvements necessary for substantial equality:

a. Separate management staffs for each new public housing development built or acquired by DHA after February 7, 1995,[7] regardless of whether those management staffs exceed HUD unit-staff ratios.

b. Refrigerated air conditioning units in all public housing units and utility allowances sufficient to pay the entire actual cost of operation of these air conditioning units.

c. A DHA public safety division staffed by a DHA Assistant Director, whose sole responsibility is the organization and supervision of security patrols within each of DHA's public housing developments, and also staffed by off-duty officers of the Dallas Police Department under contract to DHA. Specifically, this DHA security division should provide not fewer than the following number of officers on duty at all times for the designated DHA public housing developments:

Lakewest Developments – no fewer than 10 officers.

Barbara Jordan Square – no fewer than 2 officers.

Frazier Courts – no fewer than 8 officers.

Rhoads Terrace – no fewer than 4 officers.

Turner Court – no fewer than 4 officers.

Town Park Apartments – no fewer than 2 officers.

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[7] I.e., the date of this Court's Remedial Order Affecting HUD.

Brackins Village – no fewer than 3 officers.

Cedar Springs Place – no fewer than 4 officers.

Little Mexico Village – no fewer than 2 officers.

Lakeland Manor – no fewer than 2 officers.

Park Manor – no fewer than 2 officers.

Brooks Manor – no fewer than 2 officers.

Forest Green Manor – no fewer than 2 officers.

Audelia Manor – no fewer than 2 officers.

Cliff Manor – no fewer than 2 officers.

Simpson Place – no fewer than 2 officers.

Oakland Apartments – no fewer than 2 officers.

All DHA scattered site housing units – no fewer than 2 officers.

d. Youth gang intervention programs conducted by qualified personnel at each DHA family public housing development.

e. Laundry facilities equipped with automatic clothes washers and dryers in all DHA low-rent public housing developments.

f. Landscaping and automated landscape irrigation systems at each of DHA's public housing developments.

g. Supervised after-school study and tutoring programs in each DHA family development for

all children of school age living in those developments, with the necessary buildings, furniture, equipment and supplies, including personal computers suitable for student use.

h. "Headstart" programs in each DHA family development for all preschool children, ages 3 years and older, living in those developments, with the necessary buildings, furniture, equipment and supplies.

i. At least two off-duty officers of the Dallas Police Department to patrol the Lakewest Shopping Center continuously between the hours of 8:00 a.m. and 10:00 p.m.

j. Video security surveillance systems, with tape recording capacity, to provide security surveillance of all points of ingress and egress if each DHA public housing building for senior and handicapped occupancy.

k. Resident-operated cooperative retail convenience and grocery stores at Turner Court, Frazier Courts and Rhoads Terrace, with the necessary facilities and management assistance.

l. Youth sports buildings, including facilities for basketball, boxing, strength training and similar athletic and recreational activities and programs, at Little Mexico Village, Cedar springs Place. Roseland Homes and Barbara Jordan Square, with the necessary equipment and staff to supervise youth athletic programs at those facilities.

m. Ceiling rents at the minimum level permitted by statute at all DHA public housing projects.

The schedule shall be drafted to achieve the improvements in the least possible time given the funding likely to be available and list the sources of funding for each improvement. Priority shall be given to achieving the improvements in security necessary to achieve a safe environment within each project. The projects with the highest crime rate shall be given priority in the funding for the prevention of crime.

B.2 The funding available for these improvements includes the $15,000,000 in CIAP funding and DHA's formula Comprehensive Grant Program funding. Any Comprehensive Grant Program funding which becomes available for reallocation because an agency does not qualify to receive all or a part of its formula allocation pursuant to 42 U.S.C. 14371(k)(6) shall be made available for these improvements in an amount equal to DHA's relative need as determined by 42 U.S.C. 14371(k)(2)(A). Future funding for these improvements may also become available under other programs created by Congress.

B.3 HUD has the authority to increase DHA's operating subsidy beyond the performance funding system formula amount when necessary because of circumstances beyond DHA's control. 42 USC § 1437g; 24 CFR 990.109(d). The court order requiring DHA to remedy the constitutional and statutory violations of racial segregation is just such a circumstance. HUD has itself admitted the need for such increased funding by its continued provisions of the operating subsidy for the vacant West Dallas units. HUD shall take the remedial needs imposed by this order into account when setting the operating subsidy for DHA. If the subsidy provided, in combination with other funding actually available to DHA, does not

allow DHA to meet the obligations imposed under this order within a reasonable time, DHA or the plaintiffs may apply to the Court for relief.

B.4 HUD is ordered to catalog in writing all of HUD's grant programs and all of any other federal agency's grant programs which could be used to accomplish the improvements to the unit, project, and neighborhood conditions of the DHA family projects necessary to eliminate the vestiges of racial segregation. The catalog shall be completed within 30 days of the date of this order and shall be filed with the Court and served on the parties. The catalog shall be updated as old programs are abolished and new programs come into existence.

B.5 HUD is ordered to use its authority and leadership under Executive Order 12892 to convene a task force of representative of federal agencies with programs and funding which could be used to accomplish the improvements to the unit, project, and neighborhood conditions listed in B.7. below. The obvious examples of such agencies include EPA, Department of Education, Department of Health and Human Services, and the Department of Justice. HUD shall be responsible, using whatever assistance the task force may provide, for providing the timely identification of programs and funding to the local entity or entities eligible for such programs and funding and providing the technical assistance necessary to ensure that timely and complete applications, if necessary, are submitted and are given full and fair consideration by the agency involved.

B.6 HUD is ordered to use its authority to enforce the civil rights laws and the affirmatively further fair

housing provisions in the Fair Housing Act and the Community Development Block Grant Act to require the City of Dallas to affirmatively further fair housing by reducing crime in and around and blighting neighborhood conditions around DHA's family projects and achieving substantial equality to the conditions found in and around the predominantly white located HUD assisted projects in the Dallas area. The conditions which must be addressed include those listed in B.7. below.

B.7. In addition to high levels of crime, the other conditions adversely affecting all or some of DHA's family projects include:

a. exposure to industrial uses and environmental hazards,

b. inappropriate industrial zoning,

c. unsatisfactory streets, curbs, drainage, sidewalks, lighting and other municipally provided facilities,

d. lack of neighborhood commercial services such as grocery stores, pharmacies, banks or other financial institutions, and medical facilities,

e. lack of decent, standard, affordable, single family units in the neighborhoods around the projects for the persons now residing in those neighborhoods who wish to remain in those areas,

f. high concentrations of poverty households and households on public assistance, and

g. public schools challenged by high percentages of students failing to pass minimum competency tests.

B.8. HUD shall submit a plan for achieving and maintaining substantial equality of conditions in and around DHA's existing and future projects to the Court for approval within 90 days of the date of this order.

B.9. In considering any applications by the City of Dallas for HUD funds which could be used to eradicate the vestiges racial segregation in DHA's programs, HUD shall include as an objective, measurable condition affecting the allocation of assistance, the resources needed to eliminate the vestiges of racial segregation in DHA's low income housing programs.

> **Vestige C.** At least 2,850 [59.2%] of the black households on DHA's Section 8 certificate and voucher program live in predominantly black or racially concentrated and low income areas. Only 21% of those households live in predominantly white areas. 45.6% of white DHA Section 8 households live in predominantly white areas.

HUD is ordered to take the following actions to eliminate this vestige of racial secregation [sic]:

C.1. HUD shall provide DHA with $300,000 per year for ten years for the provision of mobility services to African-American applicants for DHA's low income housing programs.[8]

C.2. HUD shall take the need to eliminate Vestige C. into account in the setting and approval of Section 8 Fair Market Rent and Voucher Payment levels for Section 8

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[8] Housing mobility services shall be provided by DHA or, with the consent of the Court, by one or more third-party nonprofit organizations.

certificate and voucher programs operating in Dallas County and adjoining areas. If Fair Market Rent and voucher payment levels are adversely affecting the promotion of desegregation through the Section 8 program, and an increase in those levels is otherwise consistent with statutory requirements, HUD shall grant an exception to the Fair Market Rent level and approve an increase in the Voucher Payment Standard level necessary to obtain a desegregated housing opportunity in the Dallas County area and Plano.

C.3. HUD shall, as it has agreed, provide at least 1,000 Section 8 vouchers to the City of Dallas to be used by the City in complying with ¶3.5 of the City's 1990 Consent Decree with the plaintiffs.

> **Vestige D.** The neighborhood conditions for a majority of the black Section 8 participants are substantially inferior to the conditions in which low income whites received HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside [plaintiffs' 9/27/94 exhibits ## 70 – 73, 76, 78].

HUD is ordered to take the following actions to eliminate this vestige of racial segregation:

D.1. The actions to eliminate Vestige C. above, which will also aid in the elimination of this vestige.

D.2. HUD shall also take the need to eliminate this vestige into account in its administration of the federal programs for housing and community development throughout Dallas County, Texas and the adjoining areas.

E. Monitoring and reporting

E.1. HUD shall file quarterly reports detailing the status of compliance with each provision of this order and specifically reporting the results of that compliance.

E.2. The report for each quarter shall be filed with the Court and copies served on the parties within thirty days of the end of the quarter covered by the report.

E.3. *The Court expects the parties to cooperate in the provision of information necessary to monitor compliance with this order.* However, if agreement is not possible on any matter, and if the Special Master is not able to resolve the duspute [sic], then the discovery provisions of the Federal Rules of Civil Procedure shall be applicable.

F. Jurisdiction of the Court

F.1. The court retains jurisdiction to enforce and modify this Remedial Order according to general equitable principles.

F.2. Ten years after entry of this order, the Court shall determine whether its jurisdiction over HUD shall be continued or terminated. The Court shall extend its jurisdiction over HUD if it determines that (i) HUD has not fulfilled the specific obligations to be performed as set forth in this order or, (ii) the DHA's low income housing programs have not been desegregated to the extent practical. If the Court extends its jurisdiction solely because of (i) above, its jurisdiction shall end upon fulfillment of those specific obligations. If the Court extends its jurisdiction because of (ii) above, such jurisdiction shall end at such time as the Court determines that DHA's low

income housing programs have been desegregated to the extent practical.

F.3. Should HUD choose to assert that unitary status has been achieved before the expiration of the ten year period, then HUD shall submit to the Court, with a copy to all other parties, a detailed, factual account upon which the assertion is based and all documents upon which the assertions are based. The account shall include: all steps taken to eradicate the vestiges of racial segregation, any publicly assisted housing desegregation procedures which were not used and the explanation for the failure to use those procedures, the basis upon which HUD relies for the assertion that no further action to remove the vestiges of racial segregation is practical or required, whether or not actions by an organization, entity, or person other than HUD could further desegregation, what such actions are and the steps taken by HUD to secure the performance of such actions and the results of those steps, and any other information relevant to the determination of unitary status.

F.4. Unitary status means that the [sic] all reasonable methods have been employed and all available resources marshalled to eradicate the vestiges of racial segregation in DHA's and HUD's public housing and Section 8 housing programs, and that such vestiges have been eradicated to the extent practical.

F.5. HUD's acquiescence in the entry of this order shall not be taken as a waiver of any of its arguments based on principles of sovereign immunity.

F.6. The Secretary of HUD, the Assistant Secretary of HUD for Public and Indian Housing, and the Assistant

Secretary of HUD for Fair Housing and Equal Opportunity and their successors in office are personally responsible for compliance with this order pursuant to 5 U.S.C. § 702.

F.7. HUD shall have the right to object to those terms of the Remedial Order Affecting DHA (filed February 7, 1995) which impose obligations on HUD beyond the obligations provided in this Remedial Order Affecting HUD.

F.8. HUD's performance of its obligations under this Remedial Order will constitute full and complete relief for the violations admitted by HUD and found by the Court against HUD in this action.

ENTERED: APRIL 16, 1996

/s/ Jerry Buchmeyer
JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	*	CIVIL ACTION NO. 3:85-CV-1210-R
v.	*	CLASS ACTION
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,	*	
and	*	
U.S. DEPARTMENT OF JUSTICE	*	

REMEDIAL ORDER AFFECTING DHA

(Filed Feb. 7, 1995)

Vestige A. 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units[1] reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit # 79]. 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit # 79].

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[1] These figures exclude the approximately 46 single family homes for which DHA does not separately report racial occupancy data [plaintiffs' 9/27/94 exhibit # 68 – excerpt from DHA monthly report].

DHA is ordered to take the following actions to eliminate this vestige:

A.1. demolish at least 2,630 units of the public housing in the West Dallas project.

A.2. provide one-for-one replacement units for each unit to be demolished before the demolition of that unit. The 100 public housing units and 1,335 Section 8 certificates and vouchers previously provided by HUD are one-for-one replacement units. The 339 public housing units allocated to DHA since 1990 are one-for-one replacement units. The 335 public housing units allocated under the HUD Urban Revitalization Demonstration Grant are one-for-one replacement units. The additional 698 Section 8 vouchers promised in the HUD plan submitted to the Court are one-for-one replacement units to the extent that HUD and DHA are proceeding with demolition under the previously approved demolition plan and if the number of units in the one, two, three, four, and five bedroom unit categories being replaced are matched in the allocations of replacement units. If a new demolition plan is approved then the 42 U.S.C. 1437p prohibition against the use of vouchers as replacement units will apply.

A.3. Develop, through construction or acquisition, an additional 3,205 public housing family units in predominantly white areas. These units shall be in place and occupied before any non-family units or any units in non-predominantly white areas are developed. The restriction set out in the immediately preceding sentence does not apply to the use of public housing units in the reconfiguration of the West Dallas projects provided for in ¶ B.7. of this order. The site for each unit must be

approved by the Court and the units, projects, and neighborhoods for the units must provide housing opportunities substantially equivalent to the units, projects, and neighborhoods in and around the predominantly white located HUD assisted projects in Dallas County. The units may not be located in areas where the poverty rate exceeds 13%, the county average. The development of these units is dependent upon the provision of funding for public housing or comparable programs by HUD to DHA.

A predominantly white area, as this term is used in this order, is determined by first computing the racial composition of the geographic area within a one-quarter mile radius of the center point of the center of the proposed location of the project. If the population, using the block level data for the most current US Census, is less than 37% total non-Hispanic African-American, Hispanic, or other minority persons, then it may be a predominantly white area. The area is not a predominantly white area if it is located on or near a dividing line, such as a highway, major thoroughfare, or railroad tracks, between a predominantly white area and a racially concentrated minority area. The area is not a predominantly white area if it is located in an isolated, non-residential area. The relevant area for the determination of the poverty rate shall be the US Census census tract block group in which the site is located.

The already allocated 674 units of new public housing units shall be occupied within 3 years of the date of this order, or, if allocated for suburban development within 3 years and 6 months of the date of this order,

unless an extension is granted by the Court for good cause.

A.4. DHA shall make an application for public housing assistance at each available opportunity. All units allocated by HUD in the future shall be occupied within 3 years of the date of the allocation unless an extension is granted by the Court for good cause.

A.5. 350 of the currently available new public housing units and 50% of all subsequent allocations shall be tentatively reserved for use in predominantly white areas of the Dallas suburbs. DHA shall request that the suburbs enter into a cooperation agreement with DHA to allow the development of a reasonable number of public housing units in each suburb. If there are not enough suburban cooperation agreements signed or suburban sites available for acquisition within 6 months of the date of this order, then DHA shall develop the units in predominantly white areas of the City of Dallas. The three years for the initial occupancy of these units will begin to run after the expiration of 6 months form the date of the order.

A.6. DHA shall request the assistance of Dallas County, Texas, as part of the County's compliance with its obligation to affirmatively further fair housing in its housing and community development related activities, in securing cooperation agreements between DHA and the area suburbs.

A.7. Given the applicants' and residents' stated preference for Section 8 units, DHA is urged to devise and submit for court approval a plan which would use Section 8 certificates and vouchers to substitute for at

least part of the future allocations of new public housing in predominantly white areas. In order to be approved by the Court such a plan must:

a. ensure that the Section 8 units are from an allocation over and above DHA's past allocations and over and above DHA's future fair share allocation and are not provided as a substitute for any units which would be provided to DHA under the normal allocation process. The housing assistance must be over and above what DHA or the City would otherwise receive from HUD, and can have no effect on the amounts of future assistance HUD may provide or award to DHA or the City, and

b. ensure that the certificates and vouchers for which an offset against the new public housing development is claimed are and will be in use in predominantly white areas for the foreseeable future.

A.8. DHA may use a race conscious tenant selection method for the purposes of preventing or reducing racial identifiability if every person skipped over because of race is provided an equivalent [in terms of cost to the tenant, convenience and suitability for the family's individualized needs and location preferences] alternative housing opportunity. Before use, the method shall be submitted to the Court for approval. The race conscious tenant selection and assignment method should be used only in those instances where the desegregative benefit is substantial enough to justify the use of the resources for the alternative housing opportunities needed to achieve the benefit.

A.9. DHA may use a tenant selection and assignment method which maximizes applicant choice to the

extent the exercise of such choice does not unavoidably cause or maintain racially identifiable projects. For example, if there are 10 units in predominantly black projects available and the top ten applicants on the list are black, then the exercise of choice will not unavoidably cause or maintain racially identifiable projects. If there are 7 units in predominantly black projects and there units in a non-racially identifiable project and the top ten applicants 7 blacks and 3 whites, then the exercise of choice could cause or maintain racially identifiable projects depending on the preferences of the individual applicants.

A.10. Until another method is approved by the Court, DHA shall make the applicant with the oldest application date one offer which if refused results in placement at the bottom of the waiting list. If any appropriate units vacant at the time of the offer is located in an area or project where the applicant's race does not predominate, those units shall be offered to the applicant. Any offer to the West Dallas project may be refused by an African-American applicant and that applicant shall not lose her place on the waiting list. Any offer of a unit in a predominantly white project or location may be refused by a white applicant and that applicant shall not lose her place on the waiting list.

A.11. DHA shall ensure that each African-American household accepting a non-elderly, handicapped, or disabled designated public housing shall be placed on the Section 8 waiting list with an application date of the acceptance of the public housing. If the person accepting public housing is already on the Section 8 waiting list, then the application date is the actual application date.

Each African American household in a non-elderly, handicapped, or disabled designated public housing unit who is also on the Section 8 waiting list shall have a desegregated housing opportunity preference equal to a federal preference.

A.12. A racially identifiable minority public housing project has 75% or more non-Hispanic Black, Hispanic, or other minority total population. A racially identifiable white public housing project has 75% or more non-Hispanic white total population.

A.13. Propose and implement a plan, as approved by the Court, providing magnet project improvements for any family project located in minority racially concentrated areas for which there is not a substantial decline in racial identifiability within the three years after the unit, project, and neighborhood improvements required below are completed.

> **Vestige B.** The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance [plaintiffs' 9/27/94 exhibits ## 62 – 66, 68 – 80]. *Walker v. HUD*, 734 F.Supp. 1231, (N.D. Tex. 1989).

DHA is ordered to take the following actions to eliminate this vestige:

B.1. Prepare and submit for court approval a schedule for achieving the unit and project improvements necessary to make the unit and project conditions at DHA's

projects substantially equal to the unit and project conditions at the HUD assisted projects located in predominantly white areas of Dallas and including the improvements listed in paragraphs 32 – 35 on pages 23 – 25 and 38 – 46 on pages 26 – 27 of the DHA proposed permanent injunction for each DHA project. The schedule should be drafted to achieve the improvements in the least possible time given the funding likely to be available and list the possible sources of funding for each improvement. Priority should be given to achieving the improvements in security necessary to achieve a safe environment within each project. The projects with the highest crime rate should be given priority in the funding for the prevention of crime.

B.2. The funding available for these improvements includes the $15,000,000 in CIAP funding and DHA's formula Comprehensive Grant Program funding. Future funding may become available through other programs from local or federal agencies. DHA shall make application for all funding which could be used to address the inequalities affecting its public housing program. DHA's ability to achieve the improvements in B.2. is limited by the resources available, the need to maintain all of its units in decent, safe, and sanitary condition, and to comply with the statutory and regulatory requirements of DHA's low income housing programs.

B.3. HUD has the authority to increase DHA's operating subsidy beyond the performance funding system formula amount when necessary because of circumstances beyond DHA's control. 42 USC § 1437g; 24 CFR 990.108(d). This order requiring a remedy for the constitutional and statutory violations of racial segregation is

just such a circumstance. HUD has itself admitted the need for such increased funding by its continued provision of the operating subsidy for the vacant West Dallas units. DHA shall take the remedial needs imposed by this order into account when submitting its request for its operating subsidy from HUD. If the subsidy provided, in combination with other funding actually available to DHA, does not allow DHA to meet the obligations imposed under this order within a reasonable time, DHA or the plaintiffs may apply to the Court for relief.

B.4. The neighborhood conditions around DHA's projects which must be addressed in order to achieve substantial equality with the conditions in and around the HUD assisted projects in predominantly white areas include those listed in B.5. below.

B.5. The conditions adversely affecting all or some of DHA's projects include:

a. high rates of crime,

b. exposure to industrial uses and environmental hazards,

c. inappropriate industrial zoning,

d. unsatisfactory streets, curbs, drainage, sidewalks, lighting and other municipally provided facilities,

e. lack of neighborhood commercial services such as grocery stores, pharmacies, banks or other financial institutions, and medical facilities,

f. lack of decent, standard, affordable, single family units in the neighborhoods around the projects for the persons now residing in those neighborhoods who wish to remain in those areas,

g. high concentrations of poverty households and households on public assistance, and

h. public schools challenged by high percentages of students failing to pass minimum competency tests.

B.6. DHA's ability to affect these neighborhood conditions around the existing projects is limited to the operation of its own projects and to requesting actions by local and federal agencies and the private sector. DHA's plan for improvement of the neighborhood conditions shall include the determination of which agencies and institutions can improve the conditions and a request to those agencies and institutions for the actions which will improve the conditions.

B.7. In addition to the improvements listed for each DHA project, DHA shall implement a reconfiguration of and improvements to the West Dallas project units consistent with the concepts in the Lakewest Master Plan submitted to the Court under the following conditions:

a. no more than 950 units of public housing may remain in place after the configuration and improvements and this number shall be reduced by the number of City Consent Decree ¶ 3.5 units provided as part of the reconfiguration,

b. prior to the use of any new public housing units in the reconfiguration of the West Dallas project, DHA and plaintiffs shall seek the cooperation of the City of

Dallas in provision of up to 200 necessary infill units under ¶ 3.5 of the City Consent Decree in this case.

c. In the event that City Consent Decree ¶ 3.5 units are not available in time to be used in the reconfiguration of the first village no more than a total of 50 new public housing units may be used in the reconfiguration and improvements of that village,

d. In the event that no City Consent Decree ¶ 3.5 units become available for use in the reconfiguration of the West Dallas projects, no more than a total of 200 units of new public housing may be used in that reconfiguration. The use of these units shall not result in more than 950 public housing units remaining in place after the reconfiguration.

e. Plaintiffs are arguing for a provision in the order that would prohibit any reconfiguration or improvements to the West Dallas site "until the status of the RSR/Murmur site on the National Priorities List and any remedial efforts have been fully resolved." DHA opposes this language because "there is no evidence of any significant environmental health hazard to residents of DHA's West Dallas developments arising out of lead contamination connected with the RSR/Murmur site" and thus there should be no reason to delay the construction of improvements in West Dallas [DHA's Response to Plaintiffs' Motion for Entry of Remedial Order Affecting DHA, page 1]. This paragraph is the only paragraph in this order that has not been consented to by DHA [DHA's Response to Plaintiffs' Motion for Entry of Remedial Order Affecting DHA, page 1]. Therefore, the resolution of this issue will be set for a future hearing and resolution by the Court.

f. any construction, rehabilitation, excavation or other construction work will be done in compliance with all necessary safeguards against releases of hazardous substances,

g. DHA has requested a change in zoning to provide an adequate "buffer zone" between the industrial zoning and uses on Singleton Blvd. and the areas of the West Dallas project to be used for residential purposes.

h. the tenant selection and assignment plan shall provide that no applicant shall lose her or his place on the waiting list because a unit in the West Dallas project has been rejected,

i. the specific reconfiguration and improvements have been approved by the Court.

B.8. DHA shall submit a plan for achieving and maintaining substantial equality of conditions in DHA's existing and future projects to the Court for approval within 90 days of the date of this order.

> **Vestige C.** At least 2,850 [59.2%] of the black house-holds on DHA's Section 8 certificate and voucher program live in predominantly black or racially concentrated and low income areas. Only 21% of those households live in predominantly white areas. 45.6% of white DHA Section 8 households live in predominantly white areas.

C.1. DHA's September, 1994 survey showed that at least 23% of those on the waiting list preferred housing in the suburbs, 27% preferred housing in North Dallas, and 11% preferred housing parts of Dallas "Other" than those listed [plaintiffs' 9/27/94 exhibit # 91].

C.2. DHA shall provide the mobility services to African-American applicants for DHA's low income housing programs and class members necessary to achieve and maintain a percentage of DHA's Section 8 allocation in predominantly white areas of the Dallas suburbs and a percentage of DHA's Section 8 allocation, including those in the suburbs, in predominantly white areas of North Dallas, predominantly white other parts of Dallas County, and predominantly white adjoining areas. The percentages shall be set after completion of another survey of the area preferences of DHA's applicants and participants. DHA and plaintiffs shall attempt to agree on the contractor for the survey and the content and procedure of the survey. In the event such agreement cannot be reached, the Court will determine any issues upon which there is no agreement.

The results of the survey shall be considered by DHA and the plaintiffs in their proposals for the target percentages for the mobility program. If agreement cannot be reached, the Court will set the target percentages. These percentages shall be achieved within four years of the date of the order setting the targets and maintained thereafter.

C.3. The mobility services provided shall include landlord recruitment, FMR and voucher payment levels, child care and transportation services, and Title VIII enforcement actions. The mobility services provided by DHA shall include the provision of neighborhood specific information on crime rates, objective indicators of school quality such TAAS results for the schools in the area,

social services, job training and employment opportunities, day care, medical facilities, neighborhood shopping services, transportation, and environmental hazards or other conditions inimical to family life.

C.4. DHA's ability to provide the mobility services and achieve the target percentages depends on the availability of funding for the provision of those services, the availability of willing landlords with units in appropriate areas, the Fair Market Rent and voucher payment standard levels, and the choices of the program participants. The need to avoid concentrations of assisted persons in individual locations shall also be taken into account in determining DHA's performance in achieving the target percentages.

C.5 DHA shall conduct quality control review inspections of at least 10% of all Section 8 EHP units within 90 days after the initial or annual Housing Quality Standards inspection and comply with all HUD HQS requirements.

> **Vestige D.** The neighborhood conditions for a majority of the black Section 8 participants are substantially inferior to the conditions in which low income whites receive HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside [plaintiffs' 9/27/94 exhibits ## 70 – 73, 76, 78].

D.1. DHA shall conduct perimeter inspections of all Section 8 EHP units at least twice annually, noting all obvious code violations on surrounding properties and reporting those violations to appropriate city code officials.

D.2. DHA shall monitor criminal activity, including criminal drug related activity, at and around all apartment projects in which 10 or more DHA Section 8 participants reside. A level of criminal activity at rates higher than the overall City of Dallas rates for any category of crime which level exists for more than six months shall be grounds for refusing to approve any additional section 8 contracts at that project and for relocating those Section 8 participants in residence.

E. Monitoring and reporting

E.1. DHA shall file quarterly reports detaining the status of compliance with each provision of this order and specifically reporting the results of that compliance.

E.2. The report for each quarter shall be filed with the Court and copies served on the parties within thirty days of the end of the quarter covered by the report.

E.3. DHA shall give Plaintiffs' counsel access upon request and upon reasonable terms to information and documents relevant to compliance with the decree.

F. Jurisdiction of the Court

F.1. The Court retains jurisdiction to enforce and modify this injunction according to general equitable principles.

F.2. Should DHA choose to assert that unitary status has been achieved, then DHA shall submit to the Court, with a copy to all other parties, a detailed, factual account upon which the assertion is based and all documents

upon which the assertions are based. The account shall include: all steps taken to eradicate the vestiges of racial segregation, any publicly assisted housing desegregation procedures which were not used and the explanation for the failure to use those procedures, the basis upon which the party relies for the assertion that no further action to remove the vestiges of racial segregation is practical or required, whether or not actions by an organization, entity, or person other than DHA could further desegregation, what such actions are and the steps taken by DHA to secure the performance of such actions and the results of those steps, and any other information relevant to the determination of unitary status.

F.3. Unitary status means that the all reasonable methods have been employed and all available resources marshalled to eradicate the vestiges of racial segregation in DHA's public housing and Section 8 housing programs, and that such vestiges have been eradicated to the extent practical.

7 Feb. 95
Date

/s/ Jerry Buchmayer
United States District Judge